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In The
Supreme Court of the United States

October Term, 1972

No. 72-356

IN THE MATTER OF
PENN CENTRAL TRANSPORTATION COMPANY, DEBTOR

Richard Joyce Smith, Trustee of the Property of The New York, New Haven and Hartford Railroad Company, Debtor,

PETITIONER

v.

George P. Baker, Richard C. Bond, Jervis Langdon, Jr. and Willard Wirtz, Trustees of the Property of Penn Central Transportation Company, Debtor; Bankers Trust Company as Mortgage Trustee; and Morgan Guaranty Trust Company of New York as Mortgage Trustee;

RESPONDENTS

PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Dated: August 30, 1972

Bowne of Boston, Inc.

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and Morgan Guaranty Trust Company of New York
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THE THIRD CIRCUIT

OPINIONS BELOW

The United States District Court for the Eastern District of Pennsylvania (the "Penn Central Reorganization Court") entered its Order No. 296 on June 21, 1971 which is set forth

in the Appendix to this petition at B15-B17,[1] and its opinion and Order No. 546(B70-B91) on December 31, 1971, as amended by Order No. 552 (B96), *In re Penn Central Transportation Co.*, 337 F. Supp. 779 (E.D.Pa. 1972). Those orders were thereafter supplemented by the Penn Central Reorganization Court by Order No. 565 (B102).

In the related proceedings in the United States Court of Appeals for the Second Circuit (the subject of the Second Circuit Petition), the decision was rendered March 17, 1972 (A5-A24).

The Second Circuit's decision reversed the decision of the United States District Court for the District of Connecticut (the "New Haven Reorganization Court"), in *In re The New York, New Haven and Hartford Railroad Company*, 330 F. Supp. 131, (D. Conn. 1971), *enforced by* 331 F. Supp. 212 (D. Conn. 1971). The decision of the New Haven Reorganization Court is set forth at A25-A60 and its order at A61-A65.

JURISDICTION

The orders of the Penn Central Reorganization Court were entered on June 21, 1971, December 31, 1971, January 7, 1972 and January 25, 1972. The petitioner filed a timely notice of appeal from those orders to the Court of Appeals for the Third Circuit (the "Third Circuit") where the appeals were timely docketed. Petitioner's brief was filed June 8, 1972, appellees' briefs were filed August 10, 1972 and petitioner's reply brief was filed August 24, 1972. There has been no argu-

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[1] The petitioner herein is also the petitioner in Supreme Court Docket No. 71-14-01, dated April 28, 1972, seeking a writ of certiorari to the United States Court of Appeals for the Second Circuit (such petition being hereinafter referred to as the "Second Circuit Petition").

The two petitions involve companion cases, and the appendix to that petition is incorporated by reference for purposes of the Court's consideration of this petition. Page references herein to the appendix to the Second Circuit Petition (which is physically bound therewith) are prefaced with the letter "A" while page references to the additional appendix which accompanies the instant petition are prefaced by the letter "B".

ment and the case has not been decided by the Third Circuit. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1), 28 U.S.C. §2101(e) and Rule 19 of the rules of this Court.

STATUTES INVOLVED

The following United States statutes are involved in this case and are set forth at A1-A4:

Section 77(a) of the Bankruptcy Act, 11 U.S.C. 205(a).

Section 77(c)(6) of the Bankruptcy Act, 11 U.S.C. 205 (c)(6).

QUESTIONS PRESENTED

1. Should this Court now grant certiorari before judgment to the Third Circuit in order to consider this case concurrently with the companion Second Circuit Petition where the decision on the merits of the two cases involves substantially identical issues and could materially expedite consummation of reorganization plans under Section 77 of the Bankruptcy Act for both the New Haven and the Penn Central railroads?

2. Where the New Haven Reorganization Court entered a judgment, acting pursuant to a mandate of this Court and a specific prior reservation of jurisdiction in proceedings under §77 of the Bankruptcy Act which is the subject of the Second Circuit Petition, was that judgment *res judicata* so that the orders of the Penn Central Reorganization Court, to which this petition for certiorari is addressed, improperly sanctioned a collateral attack upon that judgment?

3. Was the Penn Central Reorganization Court correct, if it properly reached the merits of the matters adjudged by the New Haven Reorganization Court, in rejecting the equitable lien and constructive trust imposed by the New Haven Reorganization Court to secure the New Haven's right to the payment for such property which was fixed by this Court in the *New Haven Inclusion Cases*?

STATEMENT OF THE CASE

This case grows out of a controversy initiated by the Penn Central Trustees on June 17, 1971 in the Penn Central Reorganization Court as a direct consequence of an opinion, dated June 11, 1971, of the New Haven Reorganization Court in proceedings on the mandate from this Court in the *New Haven Inclusion Cases*, 399 U.S. 392 (1972). It is a companion case that relitigates the principal substantive and jurisdictional issues which are the subject of the Second Circuit Petition. The background of both cases is the merger of the Pennsylvania and New York Central Railroads and the statutorily required inclusion of the New Haven Railroad into the merged Penn Central system as a condition of the approval of the merger under the Interstate Commerce Act. The history of the proceedings and the litigation is set forth in the Second Circuit Petition. In order to avoid duplication to the greatest possible degree, reference is hereby made to the Second Circuit Petition for its statement of the case for facts underlying the present case.

To summarize the background briefly, and to add the facts of the proceedings in the Third Circuit which are only touched upon in the Second Circuit Petition, the New Haven Reorganization Court, after receiving this Court's mandate in the *New Haven Inclusion Cases*, directed the New Haven Trustee, by order dated August 10, 1970, to file a statement of position with respect to the provisions that should be included in the order of remand to the Interstate Commerce Commission (the "Commission"), and provided an opportunity for all interested persons thereafter to state their positions in light of that taken by the New Haven Trustee. During the course of those proceedings the New Haven Trustee took the position, *inter alia*, that, in order to secure the New Haven's rights to payment therefor, the order on remand to the Commission should declare that the property required to be conveyed by the New Haven to Penn Central on December 31, 1968 by the orders of the Commission and the

New Haven Reorganization Court was impressed with an equitable lien, and that the New Haven's right to income from the so-called Grand Central Terminal Properties should be protected by a constructive trust. After entry of the August 10, 1970 order, the Penn Central Trustees specifically sought authorization from the Penn Central Reorganization Court, with notice to all parties to that proceeding, to employ counsel to appear for them in the remand proceedings before the New Haven Reorganization Court (B2) and were so authorized by the Penn Central Reorganization Court (B1). The Penn Central Trustees then appeared before the New Haven Reorganization Court in the remand proceedings, challenged the court's jurisdiction and contested the merits of the issues.

After briefing and argument of the issues before the New Haven Reorganization Court, but prior to the issuance of that court's decision, the New Haven Trustee was required pursuant to Order No. 164 of the Penn Central Reorganization Court to file the New Haven's proof of claim in the Penn Central reorganization proceedings by June 1, 1971. Under this compulsion, the New Haven Trustee filed a proof of claim asserting, on the basis of the opinion of this Court in the *New Haven Inclusion Cases*, that the New Haven claim was secured by an equitable lien and constructive trust. This position was consistent with that taken by the New Haven Trustee earlier in the remand proceedings before the New Haven Reorganization Court.

The New Haven Reorganization Court entered its memorandum of decision on June 11, 1971, *In re New York, New Haven and Hartford Railroad*, 330 F. Supp. 131 (A25-60), and its order on June 22, 1971, *In re New York, New Haven and Hartford Railroad*, 331 F. Supp. 212 (A61-65). The court held that it had jurisdiction to adjudicate the issues before it. It declared an equitable lien to secure the New Haven on all the tangible property which had been conveyed by the New Haven to Penn Central, excluding rolling stock and all former New Haven property theretofore sold by Penn Cen-

tral. It also declared a constructive trust on the former right, title and interest of the New Haven in the Grand Central Terminal Properties, limited in amount to $28,438,000 plus interest, the principal amount held by this Court to be the value of the New Haven's interest in those properties, *New Haven Inclusion Cases*, 399 U.S. at 445-451.

In carrying out what it conceived would implement this Court's mandate, by adjudicating the existence of an equitable lien and constructive trust, the New Haven Reorganization Court did not, however, enter any order which enforced the lien or trust (providing only that a formal accounting of the income subject to the trust was required). It stated:

> ". . . the Penn Central Reorganization Court will remain wholly in control of the effect, if any, of such a lien on the operations of the railroad and on its reorganization plan formulation." 330 F. Supp. at 137 (A31).

In its Memorandum of Decision of June 11, 1971, the New Haven Reorganization Court directed that the settlement of order be made on or before June 22. *Id.* at 152(A60). On June 17, 1971, the Penn Central Trustees petitioned the Penn Central Reorganization Court, *inter alia*, (a) to enjoin the New Haven Trustee, his attorneys and all others from attempting to effectuate the Memorandum of Decision of the New Haven Reorganization Court and (b) to adjudicate the issues already determined by the New Haven Reorganization Court (B6-B12).

The Penn Central Reorganization Court ordered a hearing to be held on June 21, 1971 (B5). Prior to that hearing, the New Haven Trustee moved to dismiss the Penn Central Trustees' petition on the ground, among others, that it failed to state a claim upon which relief could be granted (B13).

At the hearing before the Penn Central Reorganization Court, no evidence of any nature was offered by the Penn Central Trustees in support of the injunctive relief sought. The New Haven Trustee objected to the grant of any relief sought

in the Penn Central Trustees' petition on the ground, among others, that it constituted an unwarranted collateral attack on the proceedings in the New Haven Reorganization Court (B14).

After adjournment of the hearing, the Penn Central Reorganization Court that same day entered Order No. 296 which contained the following injunction:

"The Trustee of the property of the New York, New Haven and Hartford Railroad Company, The Fidelity Bank, all other persons claiming an interest in the New Haven estate, the officers, agents, servants, employees and attorneys of any of them and all other persons, firms or corporations whatsoever and wherever situated, and whether a party to these proceedings or not, are hereby enjoined from taking any action which would enforce, collect or cause to be perfected or paid any claim against the Debtor or its estate arising out of the inclusion of the New Haven into the Debtor, other than in these proceedings, or which would interfere with the primary jurisdiction of this Court to deal with properties in its possession or under its control pending further order of this Court." (B16).

The next day (June 22, 1971), the Penn Central Trustees again appeared before the New Haven Reorganization Court, tendered a copy of Order No. 296, and opposed the entry of any order carrying out the Memorandum of Decision of June 11. The New Haven Reorganization Court, however, entered its Order of Remand on Judgment of Supreme Court in the New Haven Inclusion Cases, dated June 22, 1971 (A61-A65); and, on its own motion, entered Order No. 647, dated the same day, appointing counsel to implement its Order of Remand.

On July 1, 1971, the New Haven Trustee filed an answer in the Penn Central Reorganization Court to the June 17 petition of the Penn Central Trustees, pleading the *res judicata* effect of the judgment of the New Haven Reorganization Court (B45), and filed a notice of appeal from Order No.

296 to the United States Court of Appeals for the Third Circuit. At the same time, the New Haven Trustee filed a motion with the Penn Central Reorganization Court for a stay of Order No. 296, pending appeal to the Third Circuit (B47-B49). On July 2, 1971, the Penn Central Reorganization Court denied the application for a stay (B 50-B54), as did the Third Circuit on July 14, 1971 (B59).

Thereafter, on July 26, 1971, as fixed in Order No. 296, a hearing was held before the Penn Central Reorganization Court. The New Haven Trustee formally introduced in evidence authenticated copies of the Memorandum of Decision, dated June 11, 1971 and the Order of Remand, dated June 22, 1971 of the New Haven Reorganization Court. The New Haven Trustee asserted that the issues involved in the petition of the Penn Central Trustees were *res judicata*. Apart from documentary matters received in evidence, the hearing at that time was, in effect, an argument on the legal issues raised by Order No. 296. The Penn Central Reorganization Court specifically ruled that counsel should address themselves both to procedural matters and the merits of the issues involved (B61). At the conclusion of that hearing, the Penn Central Reorganization Court took the matter under advisement, but ordered that the injunction granted in Order No. 296 be extended until further order of the court.

The Penn Central Trustees then filed a motion in the Third Circuit to dismiss the appeal from Order No. 296, which was denied by the Third Circuit on September 13, 1971. After briefing of that appeal, counsel for the New Haven Trustee and the Penn Central Trustees, at the direction of the Third Circuit, attended a pre-argument conference on October 21, 1971 (B62). Thereafter, a conference was held by all parties to the appellate proceedings with the Penn Central Reorganization Court on November 1, 1971 (B65). That court advised the parties, by letter dated November 3, 1971, that it considered itself not to have jurisdiction to modify Order No.

296 so long as an appeal therefrom was pending in the Third Circuit (B65-B66).

By reason of the then pending appeal by the Penn Central Trustees in the Second Circuit whose decision is now the subject of the Second Circuit Petition, the parties then joined in requesting the Third Circuit to defer oral argument on the appeals from Order No. 296 (B67).

On December 31, 1971, the Penn Central Reorganization Court entered its Opinion and Order No. 546, which was amended by Order No. 552 on January 7, 1972 (B96), on the merits of the petition filed June 17, 1971 by the Penn Central Trustees which had engendered Order No. 296. *In re Penn Central Transportation Co.*, 337 F. Supp. 779, (E.D.Pa. 1972) (B70-B91). The injunctive provisions of Order No. 296 were incorporated by reference in Order No. 546, and continued in effect (B90).

On January 3, 1972, apparently without knowledge of the entry of Order No. 546, the Third Circuit dismissed the appeals from Order No. 296 without prejudice and with a suggestion relating to the injunctive portion thereof (B92-B95). On January 14, 1972, the New Haven Trustee moved the Penn Central Reorganization Court to vacate Order No. 296 (B97-B99), which motion was denied by Order No. 565 "without prejudice to the right of the movant to seek modification of Order No. 296, Order No. 546 or both pursuant to the opinion of the Court of Appeals for the Third Circuit filed January 3, 1972" (B102).

The New Haven Trustee then appealed from Order No. 296 (supplemented by Order No. 565), from Order No. 546 (as amended by Order No. 552 and supplemented by Order No. 565) and from Orders Nos. 296 and 546 (as amended by Order No. 552 and supplemented by Order No. 565). Those appeals, together with those taken by certain New Haven bondholder interests, were consolidated for briefing and argument. As of the date of this petition, briefing of the appeals has been com-

pleted, but no argument has yet been scheduled and the Third Circuit has not rendered a decision.

REASONS FOR GRANTING THE WRIT

Stripped of detail, the orders of the Penn Central Reorganization Court, which are on appeal to the Third Circuit and to which this petition for certiorari is addressed, constitute:

1. Unwarranted re-litigation of both jurisdictional and substantive issues that are the subject of petitioner's pending Second Circuit Petition;

2. An impermissible collateral attack upon the proceedings of and adjudication by the New Haven Reorganization Court in carrying out this Court's mandate in the *New Haven Inclusion Cases;* and

3. An erroneous adjudication on the merits that disregards and differs from that of the New Haven Reorganization Court and fails to protect the constitutional rights of the New Haven bondholders as adjudged by this Court in the *New Haven Inclusion Cases.*

The Court should grant this petition for certiorari in conjunction with the Second Circuit Petition, and determine the merits. This is the only court that can decide these matters with finality, an adjudication which would greatly assist in expediting the reorganization proceedings of both the New Haven and the Penn Central.

I. THE ISSUES RAISED BY THE TWO PETITIONS SHOULD BE DETERMINED CONCURRENTLY

This petition is a companion to the Second Circuit Petition. The central issues in each petition involve the respective "exclusive" jurisdictions of two district courts under Section 77 of the Bankruptcy Act, and the meaning of this Court's

opinion in the *New Haven Inclusion Cases* as to the treatment constitutionally required to be accorded persons affected by the opinion. Both petitions inherently concern issues affecting interests of investors in railroad securities at a time when the number of reorganizations under Section 77 continues to mount.[2] Both petitions arise from the need of the New Haven and Penn Central reorganization proceedings to rely on a definitive exposition by this Court of its intention in the *New Haven Inclusion Cases*, rather than on continued speculation of counsel, the Commission and the respective reorganization courts as to the intent of this Court in those *Cases*.

The basic question to be determined by the two cases is identical, involving the protection to be granted to the New Haven estate for the rights found by this Court in the *New Haven Inclusion Cases* to payment for the properties conveyed to Penn Central. The question of the *effect* of that protection in the ultimate plan of reorganization of Penn Central as a matter of the rights of creditors *vis-a-vis* one another was not intended to be, and was not, determined in either case. (A30). This petition, in addition, concerns an issue not in the Second Circuit Petition but a direct outgrowth of the same facts and issues, namely, the *res judicata* effect to be accorded the judgment of the New Haven Reorganization Court.

If the Court should grant the Second Circuit Petition and not grant this petition, the merits involved might not be reached for many years. As a result, the issues, other than that of jurisdiction, might be deferred for a period so long as to deprive parties of rights which the Court's decision in the *New Haven Inclusion Cases* was clearly intended to guarantee. Because of the identity of the issues, to await the normally desirable consideration and judgment of the Third

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[2] There are seven major northeastern railroads now in reorganization: Penn Central, New Haven, Boston & Maine, Erie Lackawanna, Lehigh Valley, Reading and Central of New Jersey.

Circuit would not, in this instance, be in the interests of judicial economy, speed or efficiency, whether of the Third Circuit or of this Court. Further, if only the Second Circuit Petition is granted, the possibility exists that the Third Circuit could render a decision in this case which would be contrary to the result reached by this Court in the Second Circuit case.[3] Such an outcome would only create more confusion and uncertainty in a situation which is already extremely complex, and almost certainly necessitate still another petition to this Court by some party.

If neither petition should be granted, the New Haven reorganization proceedings would be relegated indefinitely to its present limbo. Since the Penn Central Reorganization Court would under such circumstances have exclusive jurisdiction as to substantive New Haven reorganization matters (A 18), and since that court deferred, in the decision which is now sought to be reviewed by this petition, any final resolution of the merits of the New Haven's claims determined by this Court in the *New Haven Inclusion Cases* (B88-B90), the New Haven reorganization proceedings could not foresee any ultimate termination.

If, however, both petitions should be granted, this Court could resolve the respective jurisdictions of the two district courts and, however so determined, lay finally to rest the controversies which have arisen as to the intention of this Court in the *New Haven Inclusion Cases*. This alone would permit acceleration of the reorganization process for the New Haven under Section 77 which has now taken more than eleven years.

The decisions below in the instant case clearly constitute a departure from the accepted and usual course of judicial

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[3] This petitioner and others moved in the Third Circuit for leave, in effect, to postpone proceedings until after this Court had finally determined the Second Circuit Petition. The motion was denied May 1, 1972.

proceedings, and from prior decisions of this Court, within the concept of Rule 19 of this Court, and clearly raise the need for this Court to clarify its intention in the *New Haven Inclusion Cases*. Under these circumstances, and given the alternative consequences for the New Haven creditors whose rights to foreclose their mortgage liens were so long frustrated, the Court should grant both petitions and adjudicate the merits of the substantive controversy.

II. THE JUDGMENT OF THE PENN CENTRAL REORGANIZATION COURT SUSTAINED A COLLATERAL ATTACK IN DISREGARD OF ALL PERTINENT DECISIONS OF THIS COURT

Following remand by this Court in the *New Haven Inclusion Cases* to the New Haven Reorganization Court, the latter court held hearings as to what it should do to implement this Court's mandate and its own reserved jurisdiction in framing its order of remand to the Commission.

Penn Central had long been a party to the New Haven reorganization proceedings and, was, of course, a party to the *New Haven Inclusion Cases* that were remanded to the New Haven Reorganization Court. The Penn Central Trustees were, and are, in privity with Penn Central and bound by this Court's decision in the *New Haven Inclusion Cases*. In addition, the Penn Central Trustees, through counsel appointed specifically for the purpose by the Penn Central Reorganization Court, fully participated in the New Haven proceedings on the framing of the remand order (A28, B82).

The Penn Central Trustees raised, briefed and argued the issue of jurisdiction as well as the substantive issues regarding the declaration of an equitable lien and constructive trust (A28). The New Haven Reorganization Court specifically ruled on and rejected the Penn Central Trustees' jurisdictional defense, and expressly held that it had jurisdiction to adjudicate the issues before it (A28-A34). It then went on to

declare an equitable lien and constructive trust, limited solely to the property compelled to be conveyed by the New Haven, as protection for its right of payment for the same property (A64-A65).

The Penn Central Reorganization Court, in entering the orders appealed from by this petitioner, disregarded the pleaded judgment of the New Haven Reorganization Court, asserted exclusive jurisdiction in the same premises and addressed itself to the merits of the very controversy which had been litigated before, and adjudged by, the New Haven Reorganization Court (B70-B91). In determining its jurisdictional basis to do so, however, the Penn Central Reorganization Court failed to discuss a single decision of this Court dealing with *res judicata* and collateral attack (B70-B91).

This Court has always condemned the evil of collateral attack. It has been the unqualified doctrine of this Court that a judgment need not be free from error to be valid and binding. *Williams v. Armroyd,* 11 U.S. (7 Cranch) 423, 432, 433 (1813). If, whenever a judgment were called in question, a court in such proceeding could review the matter previously adjudged to determine whether there had been error, a judgment would have no finality. Immortal litigation would overcome mortal man, and the sound principle of fundamental repose, which underlies *res judicata,* would be subverted. *United States v. Throckmorton,* 98 U.S. 61 (1878).

Starting about forty years ago, this Court rendered a series of decisions strengthening and expanding the doctrine of *res judicata,* particularly, although not exclusively, as applied to jurisdictional issues. Thus, if a party purports to appear specially, as did the Penn Central Trustees, in order to contest jurisdiction over his person, *Baldwin v. Iowa State Traveling Men's Association,* 283 U.S. 522 (1931), or to challenge the court's jurisdiction of the subject matter, *Davis v. Davis,* 305 U.S. 32 (1938), the court has the power to decide these jurisdictional issues and its determination is not subject

to collateral attack. Even though the court may not have such jurisdiction of the subject matter as would warrant it to proceed, it has the power to decide whether it has jurisdiction over the subject matter and its judgment, whether right or wrong, is not subject to collateral attack. *Stoll v. Gottlieb*, 305 U.S. 165 (1938); *American Surety Co. v. Baldwin*, 287 U.S. 156 (1932); *Union Joint Stock Land Bank of Detroit v. Byerly*, 310 U.S. 1 (1940). Further, it matters not that its judgment is rendered under a bankruptcy statute subsequently determined to be unconstitutional. *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371 (1940). "The normal rules of res judicata and collateral estoppel apply to the decisions of bankruptcy courts." *Katchen v. Landy*, 382 U.S. 323, 334 (1966).

As to substantive adjudications, this Court has also recognized and applied the principle of *res judicata* to preclude unnecessary, repetitive litigation. *Blonder—Tongue Laboratories v. University of Illinois Foundation*, 402 U.S. 313 (1971); *Heiser v. Woodruff*, 327 U.S. 726 (1946).

Less than ten years ago, in *Durfee v. Duke*, 375 U.S. 106, 115 (1963), this Court reviewed and reaffirmed the "rule of jurisdictional finality." See also *Angel v. Bullington*, 330 U.S. 183 (1947); *United States v. United Mine Workers of America*, 330 U.S. 258 (1947).

The fact that the New Haven Trustee filed his proof of claim in the Penn Central Reorganization Court, as he was obliged to do by that Court's bar order, does not vitiate the subsequent judgments of the New Haven Reorganization Court rendered after the effective date of the bar order. The filing of a claim does not carry with it a requirement that it be adjudged by a reorganization court or that the latter is the preferred court. See *Faust v. Munson Steamship Lines*, 299 U.S. 77 (1936); *Texas v. Donoghue*, 302 U.S. 284 (1937); *Thompson v. Magnolia Petroleum Co.*, 309 U.S. 478 (1940); *Morris v. Jones*, 329 U.S. 545 (1947).

This Court should grant the petition to exercise its supervisory powers over the federal courts and to reassert the applicability of its decisions forbidding collateral attack and upholding *res judicata*.

III. THE NEW HAVEN REORGANIZATION COURT SHOULD BE SUSTAINED ON THE MERITS AS HAVING CORRECTLY CONSTRUED THE INTENTION OF THIS COURT IN THE NEW HAVEN INCLUSION CASES

At issue on the merits in these companion cases is the question of what, if any, security is required to be accorded the New Haven estate to protect its rights to payment for the property which it was compelled in the public interest to convey to Penn Central. This Court has already found the quantum of payment which is constitutionally required, *New Haven Inclusion Cases*, 399 U.S. at 489-490. This question of security, however, must be resolved before a New Haven reorganization plan can be consummated and its reorganization proceedings terminated. The resolution of the question is also vital to the formulation of a feasible reorganization plan for Penn Central, where the claim made by the New Haven Trustee is among the largest in amount and most complex in nature.

If this Court does not grant the instant petition, and review the merits in the light of its mandate, this question would remain unresolved indefinitely. The Second Circuit's decision was expressed to be solely on jurisdictional grounds, although the court stressed that it did not wish to be thought to disagree with the New Haven Reorganization Court on the merits (A19). The reasons why this Court should affirm the New Haven Reorganization Court on the merits of its findings of an equitable lien and constructive trust are set forth in detail in the Second Circuit Petition (at pages 17-30) and incorporated herein.

CONCLUSION

For the foregoing reasons, the Court should grant this petition.

Respectfully submitted,

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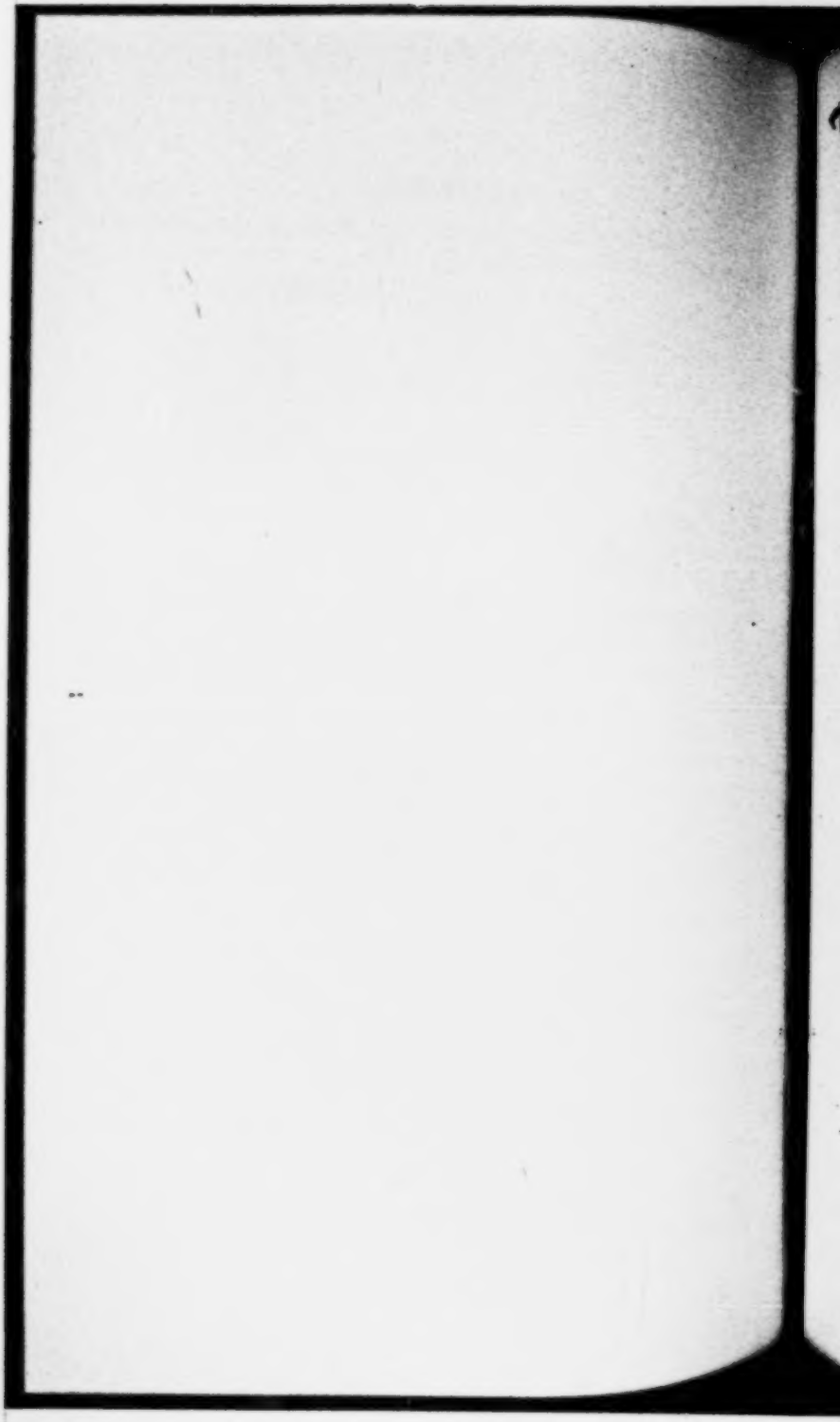
Dated: August 30, 1972



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APPENDIX TO
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In The United States District Court For The Eastern District of Pennsylvania

IN THE MATTER OF
PENN CENTRAL TRANSPORTATION COMPANY, DEBTOR
In Proceedings for the Reorganization of a Railroad
No. 70-347

ORDER NO. 67
CONFIRMING APPOINTMENT OF COVINGTON & BURLING AS SPECIAL COUNSEL FOR THE TRUSTEES

AND NOW this 14th day of October, 1970, upon consideration of the Petition of the Trustees for the confirmation of the appointment of the firm of Covington & Burling, of Washington, D.C., as their special counsel for the purpose of representing the estate of the Debtor in the litigation in connection with the inclusion of the property of The New York, New Haven and Hartford Railroad Company in the Debtor, and being satisfied that such attorneys represent no interest adverse to the Trustees or the estate of the Debtor, and that their employment would be to the best interests of the estate of the Debtor, it is ORDERED that:

1. The Trustees' appointment of the firm of Covington & Burling, of Washington, D.C., as special counsel, is hereby confirmed.

2. The Trustees are authorized to compensate the firm of Covington & Burling, for its services as special counsel, from the estate of the Debtor in such amounts as may be approved by the Court from time to time.

JOHN P. FULLAM
District Judge

In The United States District Court For The Eastern District of Pennsylvania

IN THE MATTER OF
PENN CENTRAL TRANSPORTATION COMPANY, DEBTOR
In Proceedings for the Reorganization of a Railroad
No. 70-347

PETITION OF TRUSTEES FOR CONFIRMATION OF APPOINTMENT OF COVINGTON & BURLING AS SPECIAL COUNSEL

The Trustees represent:

1. There is presently pending litigation involving the inclusion of the properties of The New York, New Haven and Hartford Railroad Company into Penn Central Transportation Company arising out of the requirements for such inclusion in the proceedings in which The Pennsylvania Railroad Company and The New York Central Railroad Company were merged.

As a result of the decision of the United States Supreme Court on June 29, 1970, in the *New Haven Inclusion Cases*, 399 U.S. 392, it now appears that there will be further proceedings before the Interstate Commerce Commission and also further proceedings in the federal courts. Questions regarding the scope and timing of such proceedings and their relationship to the reorganization proceedings in this Court are yet to be determined.

2. Petitioners deem it advisable to appoint special counsel to represent their interest in the foregoing litigation and for that purpose have appointed as special counsel, subject to the approval of this Court, the law firm of Covington & Burling, 888 Sixteenth Street, N.W., Washington, D.C. Mr. Cox, of that firm, represented the Debtor in the afore-

said proceedings before the United States Supreme Court.

3. It is the opinion of petitioners that the best interests of the estate of the Debtor will be served by continuity of counsel in its representation in the matters involved in the proposed appointment, due to counsel's experience with and background in the aforesaid litigation. Mr. Hugh B. Cox and other members of said firm also represented the Debtor in the *Penn-Central Merger Cases*, 389 U.S. 486.

4. For many years, the firm of Covington & Burling has represented the Debtor and its predecessor, The Pennsylvania Railroad Company. To the best of petitioners' knowledge, based upon specific review of the facts and representations of the firm of Covington & Burling, petitioners are satisfied that said attorneys represent no interest adverse to petitioners or to the estate of the Debtor in the matter upon which said counsel are to be engaged as proposed herein.

5. In the event of the employment of the firm of Covington & Burling, as proposed herein, the services to be rendered to petitioners by said special counsel would be services that would have been required by the Debtor even if it had not been necessary for it to file its petition for reorganization. Said services will not be rendered in or in connection with the present proceeding for the organization of the Debtor. Under these circumstances, petitioners are informed by present counsel for the petitioners, and they therefore allege, that any payments to be made to said firm for their services as proposed herein will be subject to the approval of this Court without necessity for the fixing of any maximum limits therefor by the Interstate Commerce Commission pursuant to Section 77 of the Bankruptcy Act.

WHEREFORE, petitioners pray that an order be entered herein:

(1) Confirming the appointment by petitioners of the firm of Covington & Burling, of Washington, D.C., as their

special counsel for the purpose of representing the estate of the Debtor in the litigation in connection with the inclusion of the property of The New York, New Haven and Hartford Railroad Company in the Debtor; and

(2) Authorizing petitioners to compensate said special counsel for their services, and to reimburse said special counsel for their expenses in connection therewith, from the Debtor's estate, in such amounts as may be approved by the Court from time to time.

For the Trustees:

By

JERVIS LANGDON, JR.

ROBERT W. BLANCHETTE
Counsel for Trustees

BLANK, ROME, KLAUS & COMISKY
Special Counsel for Trustees

Dated: October , 1970.

VERIFICATION

COMMONWEALTH OF PENNSYLVANIA }
COUNTY OF PHILADELPHIA } ss.

, being duly sworn, deposes and says that he is a Trustee of the property of Penn Central Transportation Company, Debtor, and is duly authorized by his fellow Trustees to make the above petition on their and his behalf, and that the statements contained in said petition are true to the best of his knowledge, information and belief.

JERVIS LANGDON, JR.

Sworn to and subscribed
before me this 14th day
of October, 1970.

CHARLES E. CASSEL, JR.
Notary Public
Philadelphia, Philadelphia County
My Commission Expires July 10, 1971.

In The United States District Court For The Eastern District of Pennsylvania

IN THE MATTER OF
PENN CENTRAL TRANSPORTATION COMPANY, DEBTOR
In Proceedings for the Reorganization of a Railroad
No. 70-347

ORDER NO. 294

AND NOW, this 17th day of June, 1971, upon consideration of the Petition of Trustees on Matters Relating to New Haven Inclusion, it is ORDERED:

1. That said Petition is hereby set down for hearing in this Court at 2:15 P.M. on the 21st day of June, 1971, at the United States District Court House, Ninth and Market Streets, Philadelphia, Pennsylvania;

2. That a copy of this Order and of the Petition be served prior to the end of the business day of June 18, 1971 upon Philadelphia counsel for all parties who are customarily notified of hearings in these proceedings; and

3. That telephonic notice of the hearing on the Trustees' petition be given forthwith to the New Haven Trustee and his counsel, to Fidelity and its counsel, to counsel for the Interstate Commerce Commission and to the Department of Justice of the United States.

JOHN P. FULLAM
District Judge

In The United States District Court For The Eastern District of Pennsylvania

IN THE MATTER OF
PENN CENTRAL TRANSPORTATION COMPANY, DEBTOR
In Proceedings for the Reorganization of a Railroad
No. 70-347

PETITION OF TRUSTEES ON MATTERS RELATING TO NEW HAVEN INCLUSION

The Trustees represent:

1. Included in the property of the Debtor are certain assets formerly owned by The New York, New Haven and Hartford Railroad Company (New Haven), Debtor in Proceedings for the Reorganization of a Railroad (No. 30226) in the United States District Court for the District of Connecticut (New Haven Court). Said assets, together with other claims and rights asserted by the New Haven, were transferred to the Debtor as of December 31, 1968, pursuant to order of the Interstate Commerce Commission (ICC) and of the New Haven Court. The circumstances of the transfer are described in, and were the subject of, the decision of the Supreme Court of the United States in *New Haven Inclusion Cases,* 399 U.S. 392 (June 29, 1970).

2. By Order of June 21, 1970 (Order No. 1), this Court approved as properly filed under Section 77 of the Bankruptcy Act the petition of the Debtor for reorganization under Section 77 of the Bankruptcy Act.

3. By petition dated July 14, 1970, Richard Joyce Smith, Trustee of the property of the New Haven, sought leave of this Court to intervene generally as a party herein,

which petition was granted by Order No. 134 herein dated January 25, 1971.

4. By petition filed dated July 27, 1970, the Fidelity Bank, as indenture trustee under the Debtor's Divisional First Mortgage securing bonds held by the New Haven Trustee, sought leave to intervene generally as a party in this proceeding, which petition was similarly granted by said Order No. 134. On information and belief, Joseph F. McDonald was at the time of said petition, and continues at this time to be, the individual co-trustee under said mortgage.

5. On August 10, 1970, the New Haven Court entered an Order in the New Haven reorganization proceedings entitled "Order for Hearing on Form of Order and Remand for Further Proceedings in the New Haven Inclusion Cases." A copy of said Order is attached hereto as Exhibit A.

6. Without prejudice to their right to take such action as they deemed appropriate in any other court in respect of any purported exercise of jurisdiction by the New Haven Court over the Trustees, the Debtor or its property, the Trustees advised the New Haven Court of their position with respect to the items contained in paragraph 3 of said Order of August 10, 1970. *Inter alia*, the Trustees took the position that the New Haven Court was without jurisdiction:

(a) to impose an equitable lien or constructive trust on, or to determine any questions otherwise affecting, the former New Haven assets;

(b) to order the Trustees or the Fidelity Bank and Joseph F. McDonald (referred to hereinafter collectively as Fidelity), as indenture trustees under the Debtor's Divisional First Mortgage, to pay to the New Haven Trustee any proceeds of sales or leases of former New Haven real estate;

(c) to order the Trustees to pay to the New Haven Trustee any income from the so-called "Grand Central Terminal Properties" (*New Haven Inclusion Cases, supra,* 399 U.S. at 438-451).

7. By submission dated as of May 31, 1971, the New Haven Trustee filed a proof of claim in these proceedings pursuant to Order No. 164 of this Court. A copy of said proof is attached hereto as Exhibit B. The validity of this claim has not been adjudicated by this Court.

8. By submission dated May 28, 1971, Fidelity filed a proof of claim in these proceedings pursuant to Order No. 164 of this Court. A copy of said proof is attached hereto as Exhibit C. The validity of this claim has not been adjudicated by this Court.

9. This Court has full and exclusive jurisdiction over all the property of the Debtor's estate, including property transferred to the Debtor by the New Haven estate on December 31, 1968. Said jurisdiction includes income derived from said property.

10. This Court has jurisdiction over the New Haven Trustee and Fidelity.

11. On June 11, 1971, the New Haven Court filed an opinion entitled "Memorandum of Decision on Issue of Equitable Lien and Other Matters Preliminary to Remand to Interstate Commerce Commission." The June 11 Memorandum concludes, *inter alia,* that the New Haven Court has jurisdiction to order, and intends to order:

(a) the imposition of an equitable lien, relating back to December 31, 1968, in favor of the New Haven estate on all of the former assets transferred by the New Haven to Penn Central, exclusive of rolling stock and the New Haven's one-half interest in the "excess income" from the Grand Central Terminal Properties;

(b) a "revesting in the New Haven of its transferred title and rights" in the Grand Central Terminal Properties and the declaration of "a constructive trust, in the New Haven's favor, to the extent of the capitalized value of one-half of the excess income received from the Grand Central [Terminal] properties";

(c) the imposition of a constructive trust in the amount of $28,438,000 on all of the Grand Central Terminal Properties as of December 31, 1968;

(d) the imposition of a constructive trust in favor of the New Haven estate of "one-half of the excess income" from "the actual monies received" by the Trustees on or after July 1, 1971 from the Grand Central Terminal Properties;

(e) "immediate payment" by the Trustees to the New Haven Trustee of "actual monies received" by the Trustees, on or after July 1, 1971, representing one-half of the "excess income" from the Grand Central Terminal Properties;

(f) in the event of "sales or other similar dispositions" of Grand Central Terminal Properties, "an appropriate liquidation of the New Haven's interest under the constructive trust";

(g) an obligation by the Debtor's estate in favor of the New Haven for interest at the appropriate legal rate from December 31, 1968 on claimed unpaid amounts resulting from the New Haven Inclusion.

12. The New Haven Court has directed that an order on its June 11, 1971 Memorandum be settled on or before 10:30 a.m., June 22, 1971.

13. The Trustees are of the opinion, and therefore

allege, that implementation of the June 11, 1971 Memorandum, most particularly in respect of the issues described in paragraphs 6 and 11 of this petition, would without limitation: conflict with and usurp the exclusive jurisdiction of this Court herein; contravene the provisions of Order No. 1 herein; impose a cloud on the title of properties in the possession, and subject to the full and exclusive jurisdiction, of this Court; violate the provisions of the Emergency Rail Services Act of 1970 (Public Law 91-663), pursuant to which Trustees' Certificates were issued, as authorized by Order No. 124 herein; hinder the ability of the Trustees to conduct rail operations; and put in jeopardy the ability of the Debtor to reorganize under Section 77 of the Bankruptcy Act.

14. The Trustees are of the opinion, and therefore allege, that current payment by them to the New Haven Trustee or Fidelity of any monies of the Debtor's estate would be improper and illegal, unless ordered by this Court, and would seriously impair their ability to conduct rail operations.

WHEREFORE, the Trustees pray that orders be entered herein:

(a) Prescribing the manner of notice of hearing on this Petition and fixing a time and place therefor;

(b) Instructing the Trustees to object in the New Haven Court to the entry of any order on, or implementing, the Memorandum of Decision dated June 11, 1971, on the ground that entry of any such order is beyond the jurisdiction of the New Haven Court and would constitute an invasion and usurpation of the jurisdiction of this Court, and on such other grounds as to the Trustees shall seem appropriate, and further instructing the Trustees that if any such order should be

entered by the New Haven Court to institute appropriate appellate proceedings;

(c) Directing the Trustees to continue to devote all income derived from properties formerly owned by the New Haven and from the Grand Central Terminal Properties to defraying current expenses of the Debtor's estate except as heretofore or hereafter ordered by this Court;

(d) Directing the Trustees not to pay any money, from any source whatever, to the New Haven Trustee, or to any other person pursuant to any order on, or implementing, the Memorandum of Decision dated June 11, 1971, pending further order of this Court;

(e) Enjoining the New Haven Trustee, Fidelity, all other persons claiming interest in the New Haven estate, the officers, agents, servants, employees and attorneys of any of them, and all other persons, firms or corporations, whatsoever and wherever situated, and whether a party to these proceedings or not, from taking any action pursuant to said Memorandum of Decision of the New Haven Court dated June 11, 1971 referred to in Paragraph 11 hereof or pursuant to any order that may be entered by the New Haven Court on said Memorandum of Decision to enforce, collect or cause to be perfected or paid any claim against the Debtor or its estate arising out of the inclusion of the New Haven into the Debtor, other than in these proceedings, until further order of this Court;

(f) Upon such further notice and hearing as this Court shall deem appropriate, adjudicating the rights of the Trustees in the properties conveyed to the Debtor by the New Haven, in the Grand Central Terminal Properties and in the income therefrom;

(g) Granting such other and further relief as this Court deems appropriate.

For the Trustees

By

A. M. SCHOFIELD
Vice President
Reorganizational Planning

EDWIN P. ROSER
Blank, Rome, Klaus & Comisky
Special Counsel for Trustees

CHARLES A. HOBBEY
Brice M. Clagett
Covington & Burling
Special Counsel for Trustees

EDWIN K. TAYLOR
Senior Corporate Counsel
Penn Central Transportation Company

Dated: June 17, 1971

VERIFICATION

COMMONWEALTH OF PENNSYLVANIA }
COUNTY OF PHILADELPHIA } ss.

A. M. SCHOFIELD, being duly sworn, deposes and says that he is Vice President-Reorganizational Planning for the Trustees of the property of Penn Central Transportation Company, Debtor, and is duly authorized by the Trustees to make and verify the above petition on their behalf, and that the statements contained in said Petition are true and correct to the best of his knowledge, information and belief.

Sworn to and Subscribed
before me this 17th day
of June, 1971.

CAROL M. CONNELL
Notary Public
Philadelphia County, Philadelphia
My Commission Expires: April 4, 1974.

EXHIBITS A AND B HAVE BEEN OMITTED.

In The United States District Court For The Eastern District of Pennsylvania

IN THE MATTER OF
PENN CENTRAL TRANSPORTATION COMPANY, DEBTOR
In Proceedings for the Reorganization of a Railroad
No. 70-347

MOTION TO DISMISS PETITION OF TRUSTEES ON MATTERS RELATING TO NEW HAVEN INCLUSION

Richard Joyce Smith, Trustee of the property of The New York, New Haven and Hartford Railroad Company, Debtor (hereinafter referred to as the "New Haven Trustee") moves the Court with respect to the petition, dated June 17, 1971, of the Penn Central Trustees (attached to the Court's Order No. 294) on matters relating to New Haven inclusion, as follows:

1. To dismiss the petition because it fails to state a claim upon which relief can be granted.

2. To dismiss the petition on the ground that it improperly seeks to enjoin the New Haven Trustee and others from responding to a direction from the United States District Court for the District of Connecticut to settle order on or before 10:30 A.M., June 22, 1971 in a proceeding before that District Court in which the Penn Central Trustees are parties.

3. To dismiss the petition on the ground that it improperly seeks to invoke the equity power of this Court through the form of a petition for instructions and directions to the Penn Central Trustees.

4. To dismiss the petition on the ground that it constitutes an improper collateral attack on the Memorandum of Decision dated June 11, 1971 of the United States District Court for the District of Connecticut in circumstances where orderly means are available which would avoid an unseemly conflict between federal courts, to secure the most rapid possible review by the Supreme Court of an order entered by said District Court in proceedings in which the Penn Central Trustees are entitled to be heard.

5. To dismiss the petition on the ground that it improperly seeks an injunction against the New Haven Trustee and others from taking an action pursuant to any order entered by the United States District Court for the District of Connecticut on said Memorandum of Decision, at a time when no such order is in existence.

Of Counsel:

JAMES WM. MOORE
54 Meadow Street
New Haven
Connecticut 06506

TATE & ERVIN
2210 Girard Trust Building
Philadelphia
Pennsylvania 19102

SULLIVAN & WORCESTER
225 Franklin Street
Boston, Massachusetts 02110

JOSEPH AUERBACH
Attorney for Richard Joyce Smith, Trustee of The New York, New Haven and Hartford Railroad Company

225 Franklin Street
Boston, Massachusetts 02110

Dated: June 21, 1971

In The United States District Court For The Eastern District of Pennsylvania

IN THE MATTER OF
PENN CENTRAL TRANSPORTATION COMPANY, DEBTOR
In Proceedings for the Reorganization of a Railroad
No. 70-347

ORDER NO. 296
GRANTING CERTAIN RELIEF TO THE TRUSTEES RELATING TO NEW HAVEN INCLUSION

AND NOW, this 21st day of June, 1971, upon consideration of the verified Petition of the Trustees on Matters Relating to New Haven Inclusion, the record in these proceedings, the "Memorandum of Decision on Issue of Equitable Lien and Other Matters Preliminary to Remand to Interstate Commerce Commission," filed June 11, 1971 (Memorandum Decision) by the United States District Court for the District of Connecticut (New Haven Court) in Proceedings for the Reorganization of a Railroad, No. 30226, and upon hearing had this day, it is hereby ORDERED:

(1) The Trustees, by their counsel, are instructed to appear before the United States District Court for the District of Connecticut (New Haven Court) in proceedings for the reorganization of The New York, New Haven and Hartford Railroad Company (New Haven), and to present objections to the entry of any order on, or any implementation of, the Memorandum Decision which is beyond the jurisdiction of the New Haven Court or which would interfere with the reorganization of the Debtor herein or the jurisdiction of this Court with respect thereto and to

present objections on such other grounds as to the Trustees or their counsel shall seem appropriate; and the Trustees are further instructed to advise the New Haven Court that their participation in such proceedings is without prejudice to the primary jurisdiction of this Court in the reorganization of the Debtor; and the Trustees are instructed to institute appropriate proceedings in this Court or elsewhere in aid thereof.

(2) The Trustee of the property of The New York, New Haven and Hartford Railroad Company, The Fidelity Bank, all other persons claiming an interest in the New Haven estate, the officers, agents, servants, employees and attorneys of any of them, and all other persons, firms or corporations, whatsoever and wherever situated, and whether a party to these proceedings or not, are hereby enjoined from taking any action which would enforce, collect or cause to be perfected or paid any claim against the Debtor or its estate arising out of the inclusion of the New Haven into the Debtor, other than in these proceedings, or which would interfere with the primary jurisdiction of this Court to deal with properties in its possession or under its control pending further order of this Court.

(3) The Trustees are directed to continue to devote all income derived from properties formerly owned by the New Haven and from the so-called "Grand Central Terminal Properties" to defray current expenses of the Debtor's estate except as heretofore or hereafter ordered by this Court.

(4) The Trustees are directed not to pay any money, from any source whatever, to the New Haven Trustee, or to any other person pursuant to any order on, or implementing, the Memorandum Decision pending further order of this Court.

(5) A hearing is set in this Court at 10:30 a.m. on the 26th day of July, 1971, at the United States Courthouse, Ninth and Market Streets, Philadelphia, Pennsylvania, at which time this Court will consider whether it should adjudicate, and may adjudicate the rights of the Trustees in the properties conveyed to the Debtor by the Trustees of The New York, New Haven and Hartford Railroad Company, in the Grand Central Terminal Properties, and in the income therefrom, and will determine whether or not to continue the foregoing relief, and to consider such other or further relief as may be required to preserve and effectuate the jurisdiction of this Court.

(6) The Trustees hereby are directed to give notice of this hearing by mailing a copy of this order to all persons who are customarily notified of hearings in these proceedings.

(7) The injunctive provisions of this order shall expire at 12 o'clock noon, on July 26, 1971, unless extended by agreement or by further order of this Court.

JOHN P. FULLAM,
District Judge

A true copy certified to
from the record

Dated June 21st, 1971

Attest: PHYLLIS L. HOO
Deputy Clerk, United States District Court, Eastern District of Pennsylvania

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In The United States District Court For The Eastern District of Pennsylvania

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IN THE MATTER OF
PENN CENTRAL TRANSPORTATION COMPANY
BANKRUPTCY
No. 70-347

Philadelphia, Pennsylvania
June 21, 1971

Before HON. JOHN P. FULLAM, J.

CRAIG WINDSOR WALLACE
Official Court Reporter
3051 U. S. Court House
Philadelphia, Pa. 19107
WA 5-9480

Present:

BLANK, ROME, KLAUS & COMISKY
BY MATTHEW BULLOCK, ESQ.,
AND
GONCER KREISTAL, ESQ.,
Special Counsel to the Trustees,
Penn Central Transportation Company

TATE & ERVIN
BY W. BOURNE RUTHRAUFF, ESQ.,
for Richard Joyce Smith, Trustee,
New Haven Railroad

DRINKER, BIDDLE & REATH
BY JACK B. JUSTICE, ESQ.,
for Girard Trust Bank,
Brown Brothers Harriman & Co., and
Chase Manhattan Bank

MORGAN, LEWIS & BOCKIUS
BY JOHN N. SCHAEFFER, JR., ESQ.,
for the Fidelity Bank

FOX, ROTHSCHILD, O'BRIEN
& FRANKEL
BY NOCHEM S. WINNET, ESQ.,
for First National City Bank of
New York

WILLKIE, FARR & GALLAGHER
BY WALTER H. BROWN, JR., ESQ.,
for Institutional Investors,
Penn Central Group

DECHERT, PRICE & RHOADS
BY MATTHEW J. BRODERICK, ESQ.,
for Penn Central Company

SAGE, GREY, TODD & SIMS
BY WILLIAM KEENAN, ESQ.,
AND
K. E. MCLAUGHLIN, ESQ.,
for New York State Urban
Development Corporation

DUANE, MORRIS & HECKSCHER
BY REEDER R. FOX, ESQ.,
for Bankers Trust Company,
as mortgage trustee

KELLEY, DRYE, WARREN, CLARK,
CARR & ELLIS
BY EDWARD ROBERTS, ESQ.,
for Manufacturers Hanover Trust
Company

DAVIS, POLK & WARDWELL
BY STEPHEN H. CASE, ESQ.,
for Morgan Guaranty Trust Company
of New York

THE COURT: Good morning.

We will take up first the trustees' petition relating to certain labor agreements.

Is there anyone present who has any objection to the granting of this petition or any position they wish to state with respect to it?

MR. BULLOCK: I am offering an affidavit of service in this matter, Your Honor.

THE COURT: All right.

There being no objection, the petition will be granted in the form of order submitted.

The petition of the New York State Urban Development Corporation.

MR. McLAUGHLIN: Your Honor, I am Mr. McLaughlin from the New York State Urban Development Corporation. I would like to take the opportunity of presenting to the Court

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AFTERNOON SESSION

APPEARANCES: (As heretofore noted)

ADDITIONAL APPEARANCES:

BLANK, ROME, KLAUS & COMISKY
BY EDWIN P. ROME, ESQ.,
AND
COVINGTON & BURLING
BY CHARLES HORSKY, ESQ.,
AND
EDWIN K. TAYLOR, ESQ.,
Special Counsel to the Trustees,
Penn Central Transportation Company

FOX, ROTHSCHILD, O'BRIEN & FRANKEL
BY FRANK M. JACKSON, ESQ.,
for First National City Bank of New York

SULLIVAN & WORCESTER
BY JOSEPH AUERBACH, ESQ.,
MORRIS RAKER, ESQ.,
AND
JAMES WILLIAM MOORE, ESQ.,
AND
TATE & ERVIN
BY SPENCER T. ERVIN, JR., ESQ.,
for Richard Joyce Smith, Trustee, New York, New Haven & Hartford Railroad

WILLIAM NELSON, ESQ.,
for the Department of Justice and the Department of Transportation

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THE COURT: Good afternoon, gentlemen and ladies.

The hearing on the petition of the trustees relating to the New Haven inclusion matters.

Mr. Rome.

MR. ROME: Good afternoon, Your Honor.

Sir, in pursuance of the direction of your Order No. 294, notice was given of this hearing in the manner therein prescribed and affidavits attesting that fact have been filed with your clerk.

This matter, sir, comes before you as a result of a series of instances with which Your Honor is intimately familiar.

You are aware, of course, sir, that following the decision of the United States Supreme Court, Judge Anderson in the New Haven reorganization court issued an order under date of August 10 of last year, as the result of which the trustees of Penn Central, as well as other interested parties, informed Judge Anderson of their respective positions with regard to the effect of the directive of the United States Supreme Court with particular reference, as Judge Anderson set forth in his order, to the problems of equitable lien and the possibility of requirement that moneys be paid over as the New Haven trustee was therein requesting to the New Haven trustee growing out of income from the Grand Central Terminal properties.

Further Your Honor is aware that recently Judge Anderson has issued a memorandum of decision following his consideration of the matters there, and in the conclusion of that memorandum of decision, Judge Anderson directed that an order pursuant to his memorandum be settled tomorrow morning, on or before 10:30 a.m.

Because of the concern which the trustees of the Penn Central feel growing out of the nature of that memorandum of decision which imposes an equitable lien on property theretofore conveyed without lien or encumbrance to Penn Central, which property the trustees of Penn Central have been administering during all of these intervening months, it has been deemed necessary, sir, to apply to Your Honor for appropriate protection of the status quo pending further determination by Your Honor with regard to the appropriate adjudication to be made of Your Honor's jurisdiction and the property that is involved.

We have a form of order which is being submitted to Your Honor, copies of which have been made available to all interested counsel here in this room, the purport of which, sir, is, as I say, a request to Your Honor to maintain

the status quo, because during all of these intervening months income has been used by the trustees growing out of the Grand Central Terminal properties in a particular fashion as free cash, in effect, for the operating of the railroad.

Your Honor is too well aware for me to have to delineate here the impact upon the cash situation of the debtor, the ability of the trustees to operate the railroad and to pursue their efforts to reorganize the debtor, if the situatiton growing from Judge Andersons opinion remains without an expression of opinion by Your Honor with regard to the jurisdiction and the effect to be given to that which has earlier occurred in these proceedings.

Your Honor, we have taken the liberty of suggesting, because of the shortness of time that has been at the disposal of the trustees in applying to Your Honor, as the order in its suggested form sets forth, that Your Honor might wish to consider setting a further hearing in this matter, at which time upon further consideration, with an opportunity for all interested parties to apply to Your Honor for such modification or suspension of whatever order Your Honor would issue in the meantime, could be considered.

Our purpose, sir, is to maintain the status quo, to have an injunction issued that would prevent any effectuation of the memorandum of decision or such order as might be entered hereafter by Judge Anderson until the matter were the subject of further delineation and consideration in this court.

No harm in our view is capable of being suffered by such a procedure, and we feel it is incumbent by reason of the shortness of time growing out of the hearing in the New Haven reorganization court tomorrow to make this application to Your Honor.

THE COURT: I was handed, just before I came into the room, a motion to dismiss by the New Haven trustee. I take it that would be appropriate to be considered at this point.

MR. ROME: Yes, sir.

MR. MOORE: For the purpose of the record, my name is James William Moore, counsel for Richard Joyce Smith, trustee of the property of the New York, New Haven & Hartford Railroad, debtor in reorganization, in the United States District Court for the District of Connecticut.

May it please the Court, undoubtedly the New Haven is an irritant of Penn Central. That phenomenon is not new. Since the early Roman times when the creditor had the right to cut up the body of his debtor or sell him into slavery, there have been very few bankrupts that have been passionately in love with their creditors, and on this, the first anniversary of Penn Central's reorganization, it seems to me that Penn Central is not too happy with its creditors. Undoubtedly, Penn Central would like to see all of its creditors go away, fold up their tents, and silently steal away.

THE COURT: Do you have any suggestions as to how that might come to pass?

MR. MOORE: No, Your Honor, but I can tell you with deference that that is not going to happen, and I would like to suggest with all due deference that the petition which the trustees are presenting to this Court is not the way to do it.

The way to determine the New Haven rights is not to start an unseemly conflict between two United States reorganization courts.

Let us get on to the United States Supreme Court, and let us get on as quickly as possible. The trustee for the New Haven and his counsel will cooperate to the fullest extent

with anyone who wants to take appellate review of any order that Judge Anderson may issue tomorrow, and we will go further than that: We will recommend a stay, a reasonable stay of any order, until appellate review can be obtained by the Supreme Court.

Now when Judge Anderson filed his memorandum of decision on June 11, the moving hand had writ, and there is nothing that anyone can do to expunge what he wrote and the reasoning he made, except, I respectfully urge, that the Supreme Court is the only court that can dispel the cloud, and so again I say, let us get on to the Supreme Court where both sides may determine once ond for all the rights that the New Haven has in this reorganization.

THE COURT: Of course, doesn't that assume that the New Haven court has jurisdiction to determine what rights the New Haven has in this reorganization?

MR. MOORE: Yes, it does, Your Honor, but the greatest decisions of the Supreme Court concerning the power of a court to determine its jurisdiction have come out of the bankruptcy decisions: Stoll against Gottlieb, Chico County Drainage District, they all stand for the proposition that the bankruptcy court's judgments are valid until properly set aside in an orderly manner.

Now certainly Judge Anderson had jurisdiction to settle the remand from the Supreme Court, and even if we grant he is in error as to many things that he has written in his memorandum, judicial error is no basis for collateral attack. If it were, immortal litigation would outlive mortal man.

There is a proper way to do this, and that is to go and get this case on the road to the Supreme Court.

THE COURT: In your view, what would be the Supreme Court's scope of review?

MR. MOORE: The very issue that we are talking about, sir.

Now, if you let me return for a moment upon the New Haven as an irritant, it is this: Under modern Section 77 procedures, all creditors are irritants, and that is because today railroads in reorganization are being run for the public interest, and therein lies a great difference between railroad reorganization of 30 and 35 years ago and that of today.

Section 77 was originally enacted to provide a means for a reorganization of a viable railroad, a railroad that was making a profit but needed a recapitalization. Reorganization was for the benefit of the security holders.

Now, how is it today? It is quite different. It is a reorganization that becomes primarily one for the public interest.

The New Haven had no net income before fixed charges, nor does Penn Central, and on its first birthday in reorganization, it is further encrusted with debt of $100 million of trustees' certificates, and before the payout is made about $400 million of extra debt for equipment, and taxes are accruing.

There is nothing about the situation that appears promising to me that there will be a reorganization in the classical sense. Now I hope that I am wrong in that.

THE COURT: And you think that that determination should be made at this early stage by the New Haven District Court; is that it?

MR. MOORE: The New Haven court is not deciding that, Your Honor, but I just want to set this in perspective to explain why the New Haven is such an irritant to Penn Central.

Penn Central would undoubtedly like us to go away.

Now what I am about to say is not intended as a criticism of anyone but rather it is intended as a remembrance of my sins past.

From 1961 to 1968 I continually worried about meeting New Haven's payroll, how to scrounge up some extra money here and there, how to keep the railroad running, and in whose interest? The public interest.

Finally, Judge Anderson decided that operational losses had to end by December 31, 1968, and the New Haven was then included in Penn Central.

I resolved then to try to defend the interests of creditors of New Haven a little better, as well as I could.

So I am not here today to speak in the public interest as far as the New Haven is concerned. As far as we are concerned, the public interest had a long, long ride, and I don't want to see the New Haven creditors' interests further eroded in the Penn Central reorganization in what is thought to be for the public interest. The public interest has already had a free ride in the Penn Central reorganization for a year, and I am not saying it should cease now, but that ride should soon come to an end.

Now, let me give you a squint at some of the New Haven's problems and the problems of its creditors. There may be some fat cats around the New Haven estate. In about ten years I haven't seen them. Instead we have $50-odd million of administration claims, cities, counties, and other municipalities with claims for taxes totaling about $20 million, and some of those tax claims go back before reorganization. The United States is a creditor for $12½ million of trustee's certificates and over $600,000 of accrued interest. Railroads have $10 million or more claims for per

diem, and over $7 million of claims of little guys, not just little guys but injured little guys, personal injury, and all of these come before the bondholders, who have been bled white.

And so you may think that is a long, roundabout way of trying to offer an excuse for being an irritant in the Penn Central reorganization, but we have a problem and interest to protect.

I realize that trustees and others charged with operating a railroad are apt to think that their highest loyalty is continuing the railroad. It is a very natural thing to do.

Years ago when railroads were profitable and a strong monopoly, there were too many in management who said, "The public be damned." Today it is the reverse. The public says, "Let the creditors be damned."

Accordingly, those in charge of a reorganization don't want to be bothered with creditors. Creditors should go away and leave them alone.

I would like to read this statement from Justice Brandeis' opinion in the Louisville Joint Stock Plan Bank v. Radford case, and that was a bankruptcy decision which dealt with the Frazier-Lempke Act, and he said:

> "For the Fifth Amendment commands that however great the nation's need, private property shall not be thus taken, even for a wholly public use, without just compensation. If the public interest requires and permits the taking of property of individual mortgagees in order to relieve the necessity of individual mortgagors, resort must be had to proceedings by eminent domain so that through taxation the burden of the relief afforded in the public interest may be borne by the public."

Now, whether Judge Anderson's opinion correctly pointed the way, be that as it may, if the Penn Central counsel differ from it, as, indeed, they have a right to do, as, indeed, I have an equal right to differ from their view, there is a well established method of procedure.

Judge Anderson has not entered any order as yet. Counsel for Penn Central trustees may object tomorrow in the New Haven court to the entry of any order at this time, to the entry of an order except in some modified form from that indicated by the opinion, to a stay of the entire order pending appelate review or to a stay of so much of the order as might call for payment of any funds, and they or any other party may proceed promptly to obtain appellate review by the Supreme Court.

As I stated earlier, New Haven will cooperate fully in achieving that objective. I cannot understand why petitioners do not proceed in that manner.

There is a million dollars of legal talent behind the petition that is presented to this court, and yet petitioners aver that they need instructions from this court to tell them to object to the New Haven court and to appeal from an adverse judgment.

Less than six months ago the petitioners filed two briefs. They totaled 77 pages, and I heard a very eloquent argument. They knew how to make objections then. For some reason their legal acumen seems to have left them entirely.

I say with all respect to this million dollars of legal talent that they ought not to come to a busy chancellor asking instructions as to whether to make objections and whether to appeal.

THE COURT: Well, I wonder if I could get back to the question I asked a while ago. What would the scope of

review be on appeal? Would not the decision of Judge Anderson reach an appellate court with some presumption of validity?

MR. MOORE: I don't think so, your Honor. It is solely a question of law, I believe. I don't think there are any real disputed facts. As I recall, when we argued the case, when we briefed it, there were no disputed facts.

THE COURT: If it should turn out that the ultimate decision was that Judge Anderson exceeded his jurisdiction, would not the entire appellate process have been just a waste of time?

MR. MOORE: Would what, sir?

THE COURT: Would not the entire appellate process have been simply a waste of time, to get a decision from the appellate court that Judge Anderson did not have jurisdiction to enter some part of the order?

MR. MOORE: Well, clearly he has jurisdiction on remand from the Supreme Court to do something, and I would suppose that it would come very clearly, whether he has construed the Supreme Court's mandate properly or improperly.

THE COURT: And if it turns out that he has construed it improperly, would not a great deal of time have been wasted in the appellate process?

MR. MOORE: No, I don't think so, Your Honor. I believe we could be up there by early fall and I think get a decision very shortly. You see, we think we have a very strong opinion from the Supreme Court. Frankly, there are statements that naturally I would prefer that they went somewhat differently, and I suspect there are statements that Penn Central counsel would rather have the other way. That is what makes a good piece of litigation or a horse race.

THE COURT: Well, my point is, assuming everyone would agree that it is desirable to have determination made by an appellate court as promptly as practicable from all standpoints, wouldn't it be preferable to have that determination made on the basis of an entire record in both courts rather than simply go up on appeal from one court?

MR. MOORE: Well, I can't see what other materials are needed for the record, Your Honor. Could you help me out a little on that?

THE COURT: Well, to be specific, wouldn't it be appropriate that the Supreme Court would have before it the views of all courts involved rather than simply the views of one court?

MR. MOORE: Personally I would be very happy that your views be stated and that they go along, but I don't think there are any other facts really, or if there are any facts, I am sure they must be documentary and could easily be agreed upon, but I don't believe there are any disputed facts in this case on the points in issue.

THE COURT: I would assume there might be some factual issues with respect to the possible impact of any order which might be entered tomorrow on the reorganization process here.

MR. MOORE: I see no reason why we can't stipulate to get those facts in the record, too.

I don't want to be unfair to Penn Central. If it needs something else to round out this picture, I am perfectly willing to have that put into the record and get before the Supreme Court.

Now, getting to this petition, Prayer B is instructing trustees to object over in New Haven tomorrow if an order is entered to institute appropriate appellate proceedings.

THE COURT: You think they would be likely to do that whether they were instructed to or not.

MR. MOORE: I always thought a country lawyer knew that much, and I felt they would wander over there without instructions. But I have no objection really to telling them to do it.

But then I look over to E, and as I construe E, I can't assist Judge Anderson in settling his order. This million-dollar group of counsel for Penn Central, they are entitled to get up and object and argue.

THE COURT: What do you think would be an appropriate description for your group of counsel, if we are going to assign values?

MR. MOORE: Give us three minutes, judge, just three minutes.

Now, C and D, those are premature at this time. We ought to see what Judge Anderson does tomorrow. He may not enter an order covering any of these things, or if he did, he might grant a stay.

Now, as those are drafted, it would seem to me it would force us to take appeals from Your Honor's judgment, because they say except as heretofore or hereafter ordered by this court, which would mean if you enter those orders and we don't appeal, an appeal goes up from Judge Anderson's court to the Supreme Court, later on we are met with res judicata from this order, even though it is not consonant with the Supreme Court mandate.

Then drop down to F. Here is relitigation all over again. Judge Anderson just got through adjudicating these matters. Maybe he didn't adjudicate them correctly, but that is nothing new in the judicial process.

There is an orderly means of appeal and not collateral attack, and what that would force us to do is to plead his judgment here, and then if Your Honor refused to give it effect, then we would have to take an appeal to the Third Circuit.

What ought to be certainly avoided are appeals going to the Second Circuit and to the Supreme Court or to the Third Circuit and from the Third Circuit to the Supreme Court. We are having some research done, and I think it is possible to get to the Supreme Court directly from Judge Anderson's opinion without going through the Second Circuit, but even if we had to go through the Second Circuit, I think there would be a very good chance of getting the Supreme Court to grant cert before judgment there, as it did in the past, because it is really to the interest of all of us to know what Potter Stewart meant and get on with the matter that way.

I am beginning to think it won't happen, but I still have a little hope that the New Haven will be reorganized before I answer the call up yonder. But be that as it may, I think we ought to try to smooth out these jurisdictional conflicts and get this case to the Supreme Court just as quickly as possible.

I thank you, Your Honor.

THE COURT: Anyone else on your side of the case?

MR. NELSON: Your Honor, my name is William Nelson, with the Civil Division of the Department of Justice. I am representing the Department of Justice and the Department of Transportation.

In general, we are in agreement with Professor Moore and the position of the New Haven in this matter.

We are perfectly aware that these are extremely difficult jurisdictional problems, any time you have two courts

in a Section 77 proceeding with overlapping jurisdiction, each having exclusive jurisdiction of the matter.

We think if the New Haven alone were in reorganization and the conflict was with the Penn Central, there would be no question as to their right to adjudicate their claim against the Penn Central in that proceeding. With Penn Central in reorganization also, it raises an insoluble jurisdictional dispute which has to be resolved in one court or the other.

Judge Anderson had jurisdiction over this matter previously as it arose through this court up to the Supreme Court and back to him on remand from the Supreme Court, and we feel that he has assumed jurisdiction over this matter, that the very difficult questions that will arise —

THE COURT: Over what matter?

MR. NELSON: Over the question of both the jurisdiction itself and the equitable lien question. I meant the equitable lien question, but both questions are very difficult.

THE COURT: What about the direction to pay?

MR. NELSON: Well, that is another entirely separate question, Your Honor. As you have noted, Professor Moore is willing to stay that issue.

Over in the New Haven case, now speaking only for the Civil Division of Justice and not the Department of Transportation, we supported the New Haven on the equitable lien, but we took no position on the question of the direction of the payment over, and I am satisfied we would not support New Haven on the direction of payment over. Whether we would oppose it I do not know, but that has yet to be determined.

THE COURT: Well, who is representing the government as creditor on the trustees' certificates in the Penn Central reorganization?

MR. NELSON: I am also representing them in that matter. As you know, there are many different interests. Antitrust has also been in this matter. I believe they will not be involved at this stage, but this matter has come on so quickly, the conflicts and the diversity of interest are enormous. I should point out that the ICC itself has a representative here, but they are not taking a position probably this morning, but over in New Haven ICC, representing the policy interests of the government, opposed the equitable lien. The Department of Justice, representing the creditor interest, which incidentally arose out of an ICC claim, supported the creditor interest; but all of this is irrelevant to my basic position here, which is only this:

Lawful opinion and subsequent order of the Court will come down tomorrow, and it is a very difficult jurisdictional problem, but the comity among the courts would only be promoted by obedience of one court to another court's order, and in the hasty research I have had a chance to do since hearing this was coming on, I have found no case in which one court has authorized another court to disobey an order of a comparable court, and I don't believe that jurisdictionally it should be done here.

I think that it would create an enormous mess and this same result could be achieved any time the two railroads in reorganization have claims back and forth against each other, and I fear that that is going to be more frequent than it has been in the past.

Thank you, Your Honor.

THE COURT: Thank you for whatever that was.

MR. SCHAEFFER: Your Honor, may it please the Court, I am John Schaeffer, representing the Fidelity Bank and Joseph F. McDonald, collectively referred to in the petition as Fidelity, as indenture trustees, under the Divi-

sional First Mortgage of Penn Central of December 31, 1968.

Fidelity's only connection with this matter is that of trustee under this indenture which gives certain contractual rights to the Penn Central on the one hand and on the other side to the New Haven trustee as the owner of all of the outstanding bonds. So our primary interest, along with those who have spoken before is one of having the jurisdictional question adjudicated as expeditiously as possible.

Fidelity is the one person other than the New Haven trustee who is specifically named in the petition as an object of relief or against whom an order should be granted in this matter.

We are somewhat unable to respond to this, because we are unable to find anything in the memorandum decision of Judge Anderson or the summary or in Mr. Rome's argument that indicates there is anything Fidelity can do or will be ordered to do.

In fact, it is my understanding that the equitable lien would be junior to the mortgage, although even that isn't very material since the person claiming the equitable lien is also the holder of the bonds under the mortgage.

But in view of the remote or undefined at this point relationship of Fidelity to the transaction, we think the petitioner is premature in requesting relief against Fidelity and should be dismissed insofar as it relates to Fidelity. That is a further point of detail.

We believe that some of the language in Paragraph E of the prayer for relief and I believe Paragraph 2 of the proposed order might be capable of an interpretation to the effect that it supersedes prior orders relating to sales of property subject to the lien of the mortgage and the applica-

tion of the proceeds thereof, and we would like to suggest that consideration be given to expressly providing in the order that it is not intended to have such effect, assuming such is the case.

THE COURT: Anyone else?

Mr. Rome.

MR. ROME: Sir, we do not differ with Professor Moore's view that this is a matter that ultimately will have to be passed upon by the United States Supreme Court, and we are equally ready to participate in a cooperative effort to get it there.

The fact remains, however, that when the matter comes on to the United States Supreme Court for its review in our contention and submission clearly that court should have the views of this court with regard to the tremendously important problems and questions involved.

There is nothing unusual in the fact that a matter may go up to the Supreme Court with differing views from courts of presumed coordinate jurisdiction.

Here we have on the face of it exclusive jurisdiction in this court of all of the property of the Penn Central, including that property which was conveyed to Penn Central free of any liens several years ago, and now we have what would appear again on its face to be an intrusion into that exclusive jurisdiction of this court.

It ought not to be a situation in which trustees merely go in and voice to Judge Anderson tomorrow the kind of objection which has heretofore been submitted to Judge Anderson as long ago as August of 1970, thereafter again in October of 1970, and again at the beginning of this year.

I think that it is obviously of help for Judge Anderson to be able to have the views of this court voiced through

instructions to the trustees so that it is not capable of being said in any way that that which occurs in the New Haven reorganization court in a manner of speaking is a self-inflicted wound so far as the Penn Central trustees are concerned, because there has been no expression of opinion by the Penn Central reorganization court. We believe that it is imperative that there be an opportunity for the New Haven court to have the benefit of the position of this court.

We recognize that there has not yet been made available to us any suggested form of order that might be submitted to Judge Anderson by the New Haven trustee. In the event that form of order in no way were to intrude upon the exclusive jurisdiction of this court, then we would be able so to inform Your Honor hereafter in the manner we have suggested with regard to a subsequent hearing.

But the emergency nature of the situation is such that it does not permit, we submit, sir, going forward tomorrow without some official expression of opinion capable of being voiced to Judge Anderson by the trustees in connection with the overall situation.

So far as review on appeal is concerned, we think that when consideration is given to the possibilities and indeed the dangers of a limitation of review on appeal via mandamus, it becomes then appropriate and necessary in the view of the Penn Central trustees, Your Honor, to have this situation go up in an appropriate, albeit expeditious fashion that would bring carefully and properly all of the points at issue before the court.

Additionally, sir, there is one compelling reason why we feel that the present petition to Your Honor is necessary. There is no ability on the part of anyone to predict what other persons may do based upon the memorandum of decision of Judge Anderson or whatever order he may enter tomorrow.

It is possible, as a matter of fact, that some portions of his order, when entered, may be self-effectuating, and it is, therefore, incumbent upon the Penn Central trustees to invite Your Honor's expression of view, so as to maintain the status quo pending a further opportunity to review that which Judge Anderson does, indeed, enter by way of order tomorrow.

In the light of those considerations, there is no unseemly conflict between two United States courts. This is nothing that has been triggered by anything that has been done in this court. It is a kind of matter where, according to the representative of the Department of Justice, there is an overlapping jurisdiction.

We contend that there is an exclusive jurisdiction here and the matter should go up on review with an appropriate expression of Your Honor's views on these compelling problems.

THE COURT: Anyone else?

MR. BROWN: Your Honor, appearing also for creditors, and I believe the largest group of creditors in this proceeding, I wish to express complete support of the Penn Central trustees' position. It seems to me to be exactly the position they should take. I see nothing unseemly whatever.

Apparently in this matter of interrelated jurisdictions, the unseemliness arises only after the first step has been taken.

I would suggest that there is nothing more appropriate than for this court to express its views about matters which lie not between two federal judges, even though the counsel for one of the parties is saying that he is here representing a creditor, the New Haven, and, of course, so he is, but before this court is the problem, the reorganization problem within the true intent of Section 77, the reorganization

problem of Penn Central, and that raises questions between creditors as well as questions between this particular creditor and this court.

And so it seems to us entirely appropriate that the order that has been requested by Your Honor's trustees should be entered here and that there should be an expression by this court which will reach the Supreme Court at or about the time of the most expeditious arrival of the entire matter at that body, and, therefore, I wish to commend the trustees and ask Your Honor to grant the relief which they seek.

THE COURT: Thank you, sir.

Anyone else?

Anything further, Mr. Moore, Mr. Auerbach?

MR. AUERBACH: No, Your Honor.

THE COURT: As everyone recognizes, the important thing here is to get all of the related matters decisively determined as soon as can reasonably be done.

I certainly am very sensitive to the desirability of avoiding what might appear to be a conflict between courts, and for that reason my present thinking is that I will not enjoin the New Haven trustee or anyone else from doing anything that they see fit to do with respect to the proceedings scheduled tomorrow in New Haven, and I certainly will not enter any order which by any possible stretch of the imagination could be interpreted as attempting to enjoin the entry of any order or attempting to control in any way the form or order which may be entered.

Nevertheless, it does seem to me that on the basis of what has been presented that there are many issues here which at least at first blush do not seem to be within the power of the New Haven court to decide, but they are just

as necessary for decision as the matters which are clearly within the jurisdiction of the New Haven court.

This court has no direct concern whatever with the implementation of the Supreme Court's mandate. The only interest that this court could possibly have in that matter might be the desirability of not wasting the resources of the trustees in carrying out steps which turn out to need to be done over again. But I don't think that gives this court any right to comment upon decisions by a court of coordinate jurisdiction.

I am, however, very much concerned about two features:

One, an attempt to direct the Penn Central trustees to make immediate payments, which it seems to me is totally contrary to at least my conception of Section 77 reorganization. In short, I don't think it could properly be held that merely because a creditor becomes a creditor as a result of a railroad reorganization proceeding that that necessarily confers some absolute priority to be able to collect that claim in another reorganization proceeding.

But these are all extremely difficult questions, as you recognize, and it seems to me that the thing to do would be to enter some kind of order in modified form which will fix a date for a further hearing in this court at which all parties can be heard on the merits of the proposed disposition by this court and that nothing be done by this court in the meantime which would even give the appearance of attempting to interfere with what Judge Anderson may wish to do in New Haven.

A date which I am prepared to suggest for a further hearing in this matter would be July 13. Is there anyone who has any violent objection to that date?

I see a violent objection rising.

MR. AUERBACH: I don't know how violent it will be, Your Honor, because I don't know how we can staff it. I will not be in the country between July 2 and July 23. Perhaps we can staff it anyway.

MR. ROME: Your Honor, not on that point, but may I beg leave to bring to your attention that we have attempted in our suggested form of order at the bottom of page 2 to take into account the fact that Your Honor might well wish not to express injunctive direction to the New Haven trustee or other persons with regard to further proceedings before Judge Anderson on any order that he might enter following his memorandum opinion, and we think that the phrase at the bottom, "Except with respect to further proceedings," and so on, would cover that.

I wanted simply to have it noted that we were sensitive ourselves to that facet of the problem.

THE COURT: Yes.

I may say that the other point which I neglected to mention — I mentioned my serious question about the order to the Penn Central trustees to make immediate payments — the other aspect of the matter which gives me concern is that, frankly, it had been my impression and so far still is, but subject, of course, to change upon persuasion, that the ultimate treatment of the New Haven as a creditor in the Penn Central reorganization would be a matter which could be decided after all parties in interest in the Penn Central proceeding had an opportunity to be heard, and presumably in connection with a plan of reorganization of the Penn Central.

It seems to me that one of the more unfortunate aspects of this present contretemps is that the Court is, in effect, pushed into a position of accelerating that determination or abdicating altogether its right to express any view on that

subject, and I have considerable difficulty with the notion that these issues should be controlled by the question of who does what first.

That to me is the most unfortunate aspect of this whole matter.

All right, now suppose we leave it this way: I will enter an order before the end of the day and will try to work out some convenient date. If counsel can get together on a mutually acceptable date for a future hearing, I will be pleased to hear from you.

Recess briefly.

(Concluded at 3:07 p.m.)

In The United States District Court For The Eastern District of Pennsylvania

IN THE MATTER OF
PENN CENTRAL TRANSPORTATION COMPANY, DEBTOR
In Proceedings for the Reorganization of a Railroad
No. 70-347

ANSWER OF RICHARD JOYCE SMITH, TRUSTEE OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY TO THE PETITION OF THE TRUSTEES, DATED JUNE 17, 1971, ON MATTERS RELATING TO NEW HAVEN INCLUSION

Now comes Richard Joyce Smith, Trustee of the property of The New York, New Haven and Hartford Railroad Company, Debtor in reorganization (the "New Haven Trustee"), and, in addition to the Motion to Dismiss filed on June 21, 1971, answers the Petition of the Trustees of the Debtor, dated June 17, 1971, on matters relating to New Haven Inclusion as follows:

FIRST DEFENSE

1. The allegations contained in paragraphs 1 through 5 of the Petition with respect to the New Haven Trustee are admitted.

2. The New Haven Trustee denies the allegation contained in the first sentence of paragraph 6 of the Petition that the participation of the Trustees of the Debtor in the said proceedings before the New Haven Court was without prejudice as alleged in the Petition, and the New Haven Trustee alleges that the Debtor is a party to said proceed-

ings. The Supreme Court has adjudged that the Penn Central Transportation Company is a party to the proceedings in the New Haven Court, *New Haven Inclusion Cases*, 399 U. S. 392 at 428 n. 57. The New Haven Trustee alleges that the Trustees of the Debtor appeared and actively participated in said proceedings and submitted to the jurisdiction of the New Haven Court.

The New Haven Trustee denies the allegations contained in the second sentence of paragraph 6 of the Petition and alleges that the position taken by the Trustees of the Debtor was as set forth in a Statement of Position, dated October 20, 1970, filed with the New Haven Court by the Trustees of the Debtor, a copy of which is attached hereto as Exhibit A.

3. The allegations contained in paragraph 7 of the Petition are admitted.

4. The New Haven Trustee alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 8 of the Petition.

5. The New Haven Trustee denies the allegation contained in paragraph 9 of the Petition that this Court has exclusive jurisdiction over the property transferred to the Debtor by the New Haven estate on December 31, 1968 or the income derived therefrom.

6. The allegations contained in paragraph 10 of the Petition are admitted.

7. The New Haven Trustee admits the allegation contained in the first sentence of paragraph 11 of the Petition. The allegations contained in the second sentence of paragraph 11 are irrelevant, inaccurate and premature, and they are denied. A correct account of the findings of the New Haven Court purported to be summarized in paragraph 11

and of the terms of the order therein anticipated is set forth in the June 11 Memorandum and in two Orders dated June 22, 1971, entered by the New Haven Court, copies of which are attached hereto as Exhibits B, C and D, respectively.

8. The allegation contained in paragraph 12 of the Petition is admitted.

9. The allegations contained in paragraphs 13 and 14 of the Petition are irrelevant, incorrect and premature, and they are denied.

SECOND DEFENSE

On June 22, 1971, following the remand by the Supreme Court of the *New Haven Inclusion Cases*, 390 U. S. 392 (1970), to the United States District Court for the District of Connecticut, in a proceeding in which the Debtor, the Trustees of the Debtor and the New Haven Trustee were parties, the United States District Court for the District of Connecticut entered its judgment (Exhibit C hereto), which is still in full force and effect. Such judgment is *res judicata* as to the matters sought to be adjudicated by the said Petition of the Trustees of the Debtor.

THIRD DEFENSE

In seeking injunctive relief, the Petition of the Trustees of the Debtor constitutes an improper collateral attack upon the jurisdiction and judgment entered June 22, 1971 of the United States District Court for the District of Connecticut (Exhibit C hereto).

FOURTH DEFENSE

In seeking an adjudication of the rights of the Trustees of the Debtor in the properties conveyed to the Debtor by the New Haven Railroad, the Petition of the Trustees of the Debtor constitutes an improper collateral attack upon the

jurisdiction and judgment of the United States District Court for the District of Connecticut and compels duplicate litigation of issues already adjudicated in that Court.

FIFTH DEFENSE

The invocation of the jurisdiction of this Court is premature in that it improperly and inaccurately anticipates the entry of the judgment of the United States District Court for the District of Connecticut.

WHEREFORE, the New Haven Trustee prays that the Petition be dismissed.

Respectfully submitted,

Richard Joyce Smith, Trustee of The New York, New Haven and Hartford Railroad Company

By his attorneys,

TATE & ERVIN
2210 Girard Trust Building
Philadelphia, Pennsylvania 19102

Of Counsel:

JAMES WM. MOORE
54 Meadow Street
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SULLIVAN & WORCESTER
225 Franklin Street
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Dated: July 1, 1971

EXHIBITS A, B, C AND D HAVE BEEN OMITTED.

In The United States District Court For The Eastern District of Pennsylvania

IN THE MATTER OF
PENN CENTRAL TRANSPORTATION COMPANY, DEBTOR
In Proceedings for the Reorganization of a Railroad
No. 70-347

APPEAL OF RICHARD JOYCE SMITH, TRUSTEE OF NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, FROM ORDER 296

APPLICATION FOR STAY OF ORDER 296 OF DISTRICT COURT PENDING APPEAL

And Now, this day of June 1971, Richard Joyce Smith, Trustee, by his attorneys Tate, Diamond, Polsky, Bauer & Ervin, applies for a stay of Order 296 pending final determination of the appeal and asserts as grounds therefor the following:

1. The Petition of The Penn Central Trustees prematurely and inaccurately anticipated the content of a Judgment of the United States District Court for Connecticut not then entered.

2. Paragraphs 3 and 4 of the Order granted relief to the Penn Central Trustees with respect to matters which proved not to be part of the judgment thereafter entered in the United States District Court for Connecticut. Accordingly, not only was the petition premature, but the relief granted proved to be academic and improper.

3. The injunction contained in paragraph 2 of the Order constitutes an improper collateral attack upon the jurisdiction of the United States District Court for Con-

necticut, and the matter pending before that court on remand from the United States Supreme Court.

4. The Order directing that a hearing be held on July 26, 1971 at which time this Court "Will consider whether it should adjudicate, and may adjudicate the rights of the Trustees in the properties conveyed to the Debtor by the Trustees of the New York, New Haven and Hartford Railroad Company, in the Grand Central Terminal Properties, and in the income therefrom", necessarily requires a determination by this Court of the jurisdiction of the United States District Court for Connecticut and, accordingly, constitutes an improper collateral attack upon the judgment of that Court and compels duplicate litigation of issues already adjudicated by that Court.

5. The injunction improperly restrains the trustee of the property of the New York, New Haven and Hartford Railroad Company, Debtor, and his attorneys from carrying out the judgment and instructions of the court of which they are duly appointed officers.

6. This court failed to make the findings of fact and to state its conclusions of law in connection with entry of the Order, as required by Rule 52(A) of the Federal Rules of Civil Procedure.

7. This court failed to state its reasons for granting the injunction contained in paragraph 2 of the Order, and the injunction is not sufficiently specific in its terms, as required by Rule 65(d) of the Federal Rules of Civil Procedure.

8. The Penn Central trustees introduced no evidence in support of their petition and, accordingly, made no showing of irreparable injury essential to the entry of an injunction.

9. The order frustrates and bars the New Haven Trustee from carrying out the instructions of the United States District Court for Connecticut and from taking whatever steps may be necessary to perfect rights of the New Haven Estate, imposes the necessity of relitigating matters already adjudicated, and thus constitutes irreparable harm to the New Haven Estate.

10. The public interest in judicial economy, finality of judgment, and seemliness of relations among federal courts of coordinate jurisdiction compels the conclusion that the Penn Central Trustees should be required to exercise their rights, if they so desire, through appropriate appellate review of the judgment of the United States District Court for Connecticut rather than be permitted to make a collateral attack in this court.

For all of these reasons, the provisions of Order 296 should be stayed pending final determination of the appeal by Richard Joyce Smith Trustee, from that Order.

TATE, DIAMOND, POLSKY, BAUER & ERVIN

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Attorneys for Richard Joyce Smith
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Of Counsel:

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In The United States District Court For The Eastern District of Pennsylvania

IN THE MATTER OF
PENN CENTRAL TRANSPORTATION COMPANY, DEBTOR
In Proceedings for the Reorganization of a Railroad
No. 70-347

MEMORANDUM AND ORDER 312

IN RE APPLICATION FOR STAY OF ORDER No. 296

On June 29, 1970, the Supreme Court of the United States handed down its opinion in the *New Haven Inclusion Cases,* 399 U.S. 392 (1970), remanding certain aspects of the New Haven reorganization case to the reorganization court (United States District Court for the District of Connecticut), for further proceedings before the Interstate Commerce Commission and the appropriate federal courts. On August 10, 1970, the Connecticut court entered an order directing various interested parties, including the New Haven Trustee and the Penn Central, to file written statements of position with respect to six specified subjects, to be considered by that court in framing its order to carry out the remand from the Supreme Court.

On June 11, 1971, the Connecticut court filed a "Memorandum of Decision," expressing its conclusions as to the subjects listed in its earlier order, and as to the nature of the order which should be entered in remanding the matter to the Interstate Commerce Commission. Among other things, the Connecticut court concluded that an equitable lien should now be imposed upon all tangible assets formerly

owned by the New Haven railroad and conveyed to the Penn Central on December 31, 1968, the lien to be retroactive to that date; that the Penn Central Trustees should be ordered, commencing July 1, 1971, to pay over currently to the New Haven Trustee one-half of the net income from the "Grand Central Terminal Properties" in New York City; and that certain payments on account, which had been made in the form of stocks and bonds, in connection with the 1968 conveyance, should no longer be regarded as payments on account, but merely as security for future payment of the total purchase price. The court scheduled a further hearing for Tuesday, June 22, 1971, for the formulation and entry of an order implementing the views expressed in the Memorandum of Decision.

Upon learning of then entry of the Memorandum of Decision above referred to, the Penn Central Trustees petitioned this Court for instructions, and for injunctive relief against the entry of such an order, to the extent that it might interfere with the exclusive jurisdiction of this Court or unduly hamper this reorganization. After due notice, a hearing on the Trustees' petition was held on Monday afternoon, June 21, 1971. At that hearing, I made it quite clear that, in order to minimize the likelihood of creating an appearance of unseemly conflict between two courts of coordinate standing,[1] this Court would not attempt in any way to interfere with the scheduled hearing in the Connecticut court the following day, nor with the entry by that court of whatever order that court deemed appropriate. However, I concluded (1) that the implementation of any order requiring the Penn Central Trustees to make immediate payments, or to sequester income, would obviously impinge upon the jurisdiction of this Court and unduly interfere with the reorganization of the Debtor, and would, in all probability, ultimately

[1] Apart from the question of exclusive jurisdiction under §77, it is significant that a proof of claim asserting the same issues was filed by the New Haven Trustee in this Court in May, and is still pending for disposition.

be determined to be beyond the jurisdiction of the Connecticut court; and (2) the implementation of any order imposing an equitable lien would be likely to have similar adverse consequences, and, at the very least, involved substantial jurisdictional issues. I determined that a further hearing should be held in this Court, at which the various complex and weighty legal issues could be fully briefed and argued, so that this Court might make an informed decision as to the proper course to follow; and that, in the interim, the *status quo* should be preserved, to the extent of preventing actual interference with the Debtor's property and the reorganization process.

Accordingly, Order No. 296 was entered, fixing a date for further hearing, on July 26, 1971, and temporarily restraining the New Haven Trustee and all persons generally from attempting to enforce payment from the Debtor's estate or taking action to enforce any lien thereon, until the hearing. In reality, this Order did no more than particularize and call attention to the provisions of Order No. 1 in this proceeding. It is noteworthy that counsel for the New Haven Trustee stated (transcript p. 2467) that he would recommend a stay of any order which might be entered in the Connecticut court "until appellate review can be obtained by the Supreme Court." Nevertheless, the New Haven Trustee has now filed an application for a stay of Order No. 296. Since Order No. 296 clearly did not interfere with the June 22 hearing in the Connecticut court, and since it does nothing more than attempt to preserve the *status quo* until the hearing in this Court, the present application for a stay is in reality a request that the Order be vacated, so that steps can be taken in advance of the July 26 hearing in this Court to deplete the Debtor's estate or otherwise interfere with this reorganization. The application will be denied.

The principal grounds asserted in the application are that, since the order ultimately entered in the Connecticut

court on June 22 does not direct the Penn Central Trustees to make immediate payments (as had been intimated in the Memorandum of Decision of June 11), the restraints of this Court's Order No. 296 are unnecessary ("premature, academic and improper"). There are at least two answers to this argument. In the first place, it is far from clear that the June 22 orders of the Connecticut court would necessarily be interpreted as limiting in any way the conclusions expressed in the June 11 "Memorandum of Decision," which itself may constitute an order of that court. Paragraph 8 of the Order of Remand appears to incorporate by reference the terms of the Memorandum of Decision.

More importantly, the Order of Remand purports to appropriate for the New Haven Trustee one-half of the excess income from the Grand Central Terminal properties, commencing July 1, 1971. The distinction between this provision and a direction to the Penn Central Trustees to pay, may prove to be nebulous. Moreover, a separate order was entered on the same day (Order No. 647) in which the Connecticut court "on its own motion" appointed an attorney "as the court's counsel to take such steps . . . as he may deem to be necessary or appropriate to preserve the equitable lien and constructive trust declared by this court . . ."; including, apparently, recordings in four states to be-cloud the title to the property of the Debtor.

I do not profess a complete understanding of all of the possible ramifications of the June 22 orders, but I am not persuaded that the *status quo* would continue undisturbed in the absence of the restraints imposed by Order No. 296.

It is further suggested that Order No. 296 is invalid because it does not contain supporting reasons, pursuant to Federal Rule of Civil Procedure 52(a). Assuming the applicability of this Rule in bankruptcy, I believe the reasons were adequately expressed of record at the conclusion of the hearing on June 21.

Finally, it should be noted that there has never been, and is not now, any suggestion that the New Haven Trustee would in any way be prejudiced by preserving the *status quo* until the hearing in this Court on July 26 (a date selected by agreement of counsel in order to suit the convenience of New Haven counsel).

ORDER NO. 312

AND NOW, this 2nd day of July, 1971, it is ORDERED that the Application for a Stay of Order No. 296 pending appeal therefrom is hereby DENIED.

JOHN P. FULLAM
District Judge

United States Court of Appeals For The Third Circuit

No. 71-1582

ORAL ARGUMENT REQUESTED

IN THE MATTER OF
PENN CENTRAL TRANSPORTATION COMPANY, DEBTOR
Richard Joyce Smith, Trustee of the Property of
The New York, New Haven, and Hartford
Railroad Company, Debtor,

APPELLANT

v.

George P. Baker, Richard C. Bond,
Jervis Langdon, Jr., and Willard Wirtz,
Trustees of the Property of Penn Central
Transportation Company, Debtor,

APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MOTION FOR STAY PENDING APPEAL

Now comes appellant and moves this court for a stay of Order No. 296, entered by the United States District Court for the Eastern District of Pennsylvania in *In the Matter of Penn Central Transportation Company, Debtor*, No. 70-347, pending the hearing and determination of his appeal from said Order, which appeal was docketed July 1, 1971.

Appellant has moved for a stay of said Order in the District Court, and his motion has been denied. This motion is made on the following grounds:

1. The Order prematurely and inaccurately anticipated the content of a judgment of the United States District Court for the District of Connecticut not then entered.

2. Paragraphs 3 and 4 of the Order granted relief to the Penn Central Trustees with respect to matters which proved not to be part of the judgment thereafter entered by the United States District Court for the District of Connecticut. Accordingly, not only was the Order premature, but the relief granted proved to be academic and improper.

3. The injunction contained in paragraph 2 of the Order constitutes an improper collateral attack upon the jurisdiction of the United States District Court for the District of Connecticut and the matter pending before that court on remand from the Supreme Court of the United States.

4. The injunction improperly restrains the Trustee of the property of the New York, New Haven and Hartford Railroad Company, Debtor, and his attorneys from carrying out the judgments and instructions of the Court of which they are duly appointed officers.

5. The Order directing that a hearing be held on July 26, 1971 at which time the District Court "will consider whether it should adjudicate, and may adjudicate, the rights of the [Penn Central] Trustees in the properties conveyed to the Debtor by the Trustees of The New York, New Haven and Hartford Railroad Company, in the Grand Central Terminal Properties, and in the income therefrom," necessarily requires a determination by the District Court

below of the jurisdiction of the United States District Court for the District of Connecticut and, accordingly, constitutes an improper collateral attack upon the judgment of the latter Court and compels duplicate litigation of issues already adjudicated by that Court.

6. The District Court failed to state its reasons for granting the injunction contained in paragraph 2 of the Order, and the injunction is not sufficiently specific in its terms, as required by rule 65(d) of the Federal Rules of Civil Procedure.

7. The District Court failed to make the findings of fact and to state its conclusions of law in connection with entry of the Order, as required by Rule 52(a) of the Federal Rules of Civil Procedure.

8. No evidence was introduced in the District Court. Thus, there was no showing of irreparable injury essential to the entry of an injunction.

9. The Order frustrates and bars the appellant from carrying out the instructions of the United States District Court for the District of Connecticut and from taking whatever steps may be necessary to perfect the rights of the New Haven Estate, and compels him to relitigate matters already adjudicated. The order thus constitutes irreparable harm to the New Haven Estate.

10. The public interest in judicial economy, finality of judgments, and seemliness of relations among Federal courts of co-ordinate jurisdiction compels the conclusion that the Penn Central Trustees should be required to exercise their rights, if they so desire, through appropriate appellate review of the order of the United States District Court for the District of Connecticut rather than be permitted to collaterally attack that order in the District Court below.

Appellant requests an opportunity for oral argument on this motion.

Respectfully submitted,

RICHARD JOYCE SMITH
Trustee of The New York, New Haven and Hartford Railroad Company, Debtor

By his attorneys,

TATE & ERVIN
2210 Girard Trust Building
Philadelphia, Pennsylvania 19102

Of Counsel:

JAMES WM. MOORE
54 Meadow Street
New Haven, Connecticut 06506

SULLIVAN & WORCESTER
225 Franklin Street
Boston, Massachusetts 02110

Dated: July 2, 1971

B-59

United States Court of Appeals
For The Third Circuit

No. 71-1582

July 2, 1971

IN THE MATTER OF
PENN CENTRAL TRANSPORTATION COMPANY, DEBTOR

Richard Joyce Smith, Trustee of the New York,
New Haven & Hartford Railroad, Appellant
(D. C. No. B-70-347 In Bankruptcy)

Present: Van Dusen and Aldisert, Circuit Judges

1. Appellant's motion for stay pending appeal of order No. 296 entered June 21, 1971 by the United States District Court for the Eastern District of Pennsylvania.

in the above listed for Wednesday, July 14, 1971.

Respectfully,

Clerk

enc.
fm

The foregoing Motion is denied.

By the Court,

Judge

Dated: July 14, 1971

B-60

In The United States District Court For The Eastern District of Pennsylvania

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IN THE MATTER OF
PENN CENTRAL TRANSPORTATION COMPANY, BANKRUPTCY
No. 70-347

Philadelphia, Pennsylvania
July 26, 1971

Before HON. JOHN P. FULLAM, J.

Craig Windsor Wallace
Official Court Reporter
3051 U. S. Court House
Philadelphia, Penna. 19107
WA 5-9480

MR. MOORE: Thank you, sir.

It wasn't too clear to me, Your Honor, just what issues would be gone into this morning. May I respectfully ask are the merits of the equitable lien and the constructive trust before you, sir, or are you confining this hearing to what I thought it would be, on the matter of res judicata?

THE COURT: The order which set this date for hearing, in that order I tried to make it clear that I would consider two things:

No. 1, whether I should adjudicate the issue, and, secondly, what that adjudication might be, if I decide that I should.

The purpose was to telescope both sections of it into one hearing so that there would not be delay in the event that it was decided that I should try to adjudicate it. Therefore, I would suggest that you proceed to express your views on both, but with no decision as yet as to whether the Court will make such a decision.

MR. MOORE: Your Honor, I would like to move this court, one, to sustain respondent's plea of res judicata; two, in the event it instructs the trustees of the debtor to seek appellate review of the order on remand entered June 22, 1971, the remand order, by the United States District Court for the District of Connecticut, to instruct the trustees to limit that review to the merits and otherwise expedite review to the end that the substantive issues encompassed by the remand order will be determined with finality as soon as possible; three, to permit expiration of the injunctive provisions of Order No. 296 herein, in accordance with the terms thereof, and since Your Honor takes the view that the merits of the equitable lien and constructive trust are before the court or at least you want them presented, I respectfully stand on the merits as set forth in Judge Anderson's order of June 22, the order of remand, and for the reasons stated in his memorandum of decision of June 11.

1808 Six Penn Center
Philadelphia, Pa. 19104
October 22, 1971

Honorable John P. Fullam
United States District Court for the
Eastern District of Pennsylvania
6049 United States Courthouse
9th and Market Streets
Philadelphia, Pa. 19107

Re: In the matter of Penn Central Transportation Company, Debtor — Docket Nos. 71-1582 and 71-1734 in the United States Court of Appeals for the Third Circuit.

Dear Judge Fullam:

The above matters refer to appeals from Your Honor's Order No. 296 in the Penn Central Reorganization Proceedings taken respectively by Richard Joyce Smith, the New Haven Trustee, and The New Haven 4% Bondholder's Committee.

On October 21, 1971, upon request of the United States Court of Appeals for the Third Circuit, per Aldisert, Gibbons and Rosenn, JJ., Counsel for the New Haven Trustee and Special Counsel for the Penn Central Trustees attended a pre-argument conference in appeal No. 71-1582 taken by the New Haven Trustee.

At that time, after a thorough, candid discussion by the parties, the Panel was of the opinion that certain issues raised in both appeals concerning the interpretation of Order No. 296 could be resolved without requiring decision at this time by the Court of Appeals. Accordingly, the Panel directed the following without entry of an order:

1. The argument in No. 71-1582, which had been scheduled for October 22, was postponed indefinitely, and without determination whether the matter eventually would be heard orally.

2. The Panel also determined to consolidate the appeal in No. 71-1734 with the appeal in No. 71-1582, and Special Counsel for the Penn Central Trustees agreed to proceed without further briefing. It was stipulated that such consolidation would be without prejudice to the Penn Central Trustees' position that said Appellant has no standing to appeal from Order No. 296.

3. The Panel would have assigned to it, and retain jurisdiction of, the consolidated appeals.

4. The parties were asked to take up with Your Honor some of the questions which emerged from the interpretation of Order No. 296 and, further, t oexplore other areas of dispute arising from that Order.

5. The Panel directed the parties to advise the Clerk of the Court of Appeals in writing within 15 days of the results of the foregoing.

The Panel expressed its hope that the parties would apply to the United States Court of Appeals for the Second Circuit for expeditious disposition of the appeals now pending before that Court from the Order of Remand of the United States District Court for the District of Connecticut.

The Panel stated that its actions described above do not imply that the Court of Appeals would defer disposition of any appeal which may be taken from a decision by Your Honor on the merits of the questions now pending before you.

In order to carry out the instructions of the Panel, and with the hope of narrowing issues in this matter, it is respectfully requested that Your Honor meet in chambers

with the parties. Because of the aforementioned consolidation of appeals from Order No. 296, it was suggested that counsel for the New Haven Bondholders' Committee be invited to participate in any such meeting. It was stipulated that such participation, if any, by counsel for that Committee, would be without prejudice to the Penn Central Trustees' position that said Committee has no standing to appeal. Counsel for the New Haven Trustee has reported to counsel for the Bondholders' Committee the discussions held at the conference with the Panel.

The foregoing statements do not purport to summarize all the views expressed by the Panel, or individual members thereof. Each of the parties would cover such of these which appeared pertinent in connection with a meeting with Your Honor.

If these suggestions are agreeable to Your Honor, upon hearing from your Clerk, the undersigned will undertake to advise the parties.

Respectfully submitted,

SPENCER ERVIN,
Counsel for Richard Joyce Smith,
Trustee of the Property of
The New York, New Haven &
Hartford Railroad Company, Debtor

JOHN F. DEPODESTA,
Reorganization Attorney,
Trustees of the Property of
Penn Central Transportation
Company, Debtor

cc: HONORABLE THOMAS QUINN
LESTER C. MIGDAL, ESQUIRE
HAROLD GREENBERG, ESQUIRE

United States District Court

November 3, 1971

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JOHN F. DEPODESTA, ESQ.
Penn Central Transportation
Company
18th floor – Six Penn Center
Philadelphia, Pa. 19103

Re: Penn Central Transportation Company—New Haven—
Third Circuit Appeals Nos. 71-1582, 71-1734

Gentlemen:

At the conference in chambers held November 1, 1971, there were three principal areas of activity which the New Haven Trustee wished to be free to pursue without running afoul of the restrictions imposed by Order No. 296.

1. To take steps to apply to the United States Supreme Court for certiorari before judgment of the Second Circuit, in the pending appeal from the New Haven court's order;

2. To take the necessary steps to schedule further proceedings before the I.C.C. in connection with Judge Anderson's order of remand; and

3. To study fully whether all possible steps have been taken by Mr. Sistare to perfect the "equitable lien" and, if not, to rectify any omissions in this regard.

With respect to the first two of these items, the application for certiorari and the further proceedings before the I.C.C., I believe we all were and are agreed that there is nothing in Order No. 296 which would interfere with these proposed actions. With respect to the third item, there is no agreement, and I stated that I would advise the parties of my views today. I now do so.

In my opinion, neither the New Haven Trustee nor his counsel, nor anyone else acting at their request or suggestion, could take any further action to record or perfect the recordation of the "equitable lien" without violating Order No. 296 as it now stands. Accordingly, if these activities were to be permitted, a modification of Order No. 296 would be required. It would be necessary for someone to make application for such amendment, and there would have to be a hearing at which the views of all interested parties could be presented.

I believe it would be inappropriate for me to give any indication of whether such amendment would be approved, in the absence of a formal application, and without having heard the views expressed at such a hearing. I do not know whether your conference with the Third Circuit panel would justify the conclusion that this issue should be dealt with somewhat less formally than I have just indicated. But even if this question could be disposed of informally, I do not believe I have any jurisdiction to amend Order No. 296 while an appeal is pending.

Very truly yours,

JOHN P. FULLAM

JPF/bjd

November 5, 1971

The Hon. Thomas Quinn
Clerk, U. S. Court of Appeals
for the Third Circuit
Courthouse, 9th and Chestnut Streets
Philadelphia, Pennsylvania

RE: In the matter of Penn Central Transportation Company, Debtor — Docket Nos. 71-1582 and 71-1734 in the United States Court of Appeals for the Third Circuit.

Dear Mr. Quinn:

Reference is made to the letter of October 22, 1971 sent to The Honorable John P. Fullam, with a copy to you, in connection with the meeting held October 21, 1971 regarding procedure in the above matters.

Please find enclosed a copy of the letter dated November 3, 1971 which we have received from Judge Fullam.

It seems to us, in view of Judge Fullam's letter, and the discussion which he was good enough to have with us on November 1, that it would be appropriate to defer for a reasonable time the assignment of the above appeals for oral argument.

Very truly yours,

JOHN F. DEPODESTA
Reorganization Attorney,
Trustees of the Property of
Penn Central Transportation
Company, Debtor, Appellee in
Nos. 71-1734 and 71-1582

HAROLD GREENBERG
Cohen, Shapiro, Polisher, Shiekman
and Cohen
Counsel for New Haven 4% Bondholders Committee, Appellant in No. 71-1734

W. BOURNE RUTHRAUFF
Tate and Ervin
Counsel for Richard Joyce Smith,
Trustee of the Property of The
New York, New Haven & Hartford
Railroad Company, Debtor,
Appellant in No. 71-1582

November 10, 1971

A. Daniel Fusaro, Esquire
Clerk, United States Court of Appeals
For the Second Circuit
United States Courthouse
Foley Square
New York, New York 10007

Re: In the matter of New York, New Haven and Hartford Railroad Company — Appeal
Docket Nos. 71-1903, 71-1929 and 71-2024

Dear Mr. Fusaro:

The above-captioned appeals present issues of great importance which, for the best interest of all parties and of the public, should be finally resolved at the earliest possible date.

It presently appears that briefing in these appeals will be complete on or about December 20, 1971.

A related proceeding is presently pending before the United States Court of Appeals for the Third Circuit. In a pre-argument conference in that proceeding held on October 21, 1971, a panel of that Court expressed the hope that the undersigned would seek all possible expedition of the instant appeals in this Court.

We therefore respectfully request that the Court schedule argument in the above-captioned appeals as soon as

possible after the completion of briefing, so that final disposition of these appeals can be expedited.

Yours very truly,

BRICE M. CLAGGETT

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Washington, D.C. 20006

Special Counsel For the
Penn Central Trustees, Appellants.

JOSEPH AUERBACH

Sullivan & Worcester
225 Franklin Street
Boston, Massachusetts 02110

Attorney For Richard Joyce Smith,
Trustee of the Property of
The New York, New Haven and
Hartford Railroad Company,
Debtor, Appellee.

do

cc: Thomas Quinn, Esquire
Clerk, U.S. Court of Appeals for the Third Circuit

B-70

In The United States District Court For The Eastern District of Pennsylvania

IN THE MATTER OF
PENN CENTRAL TRANSPORTATION COMPANY, DEBTOR
In Proceedings for the Reorganization of a Railroad
No. 70-347

[In re: Claim of Richard Joyce Smith,
Trustee of the N.Y., N.H. & H. Railroad]

OPINION
ORDER NO. 546

FULLAM, J. December 31, 1971

The Trustees have petitioned for determination of the issues raised by the proof of claim filed by the reorganization Trustee of the New York, New Haven and Hartford Railroad Company (hereinafter "New Haven Trustee"), and certain related applications by the Trustees for interim relief. The claim in question is an outgrowth of the litigation which culminated in the decision of the Supreme Court in the *New Haven Inclusion Cases*, 399 U.S. 392 (1970). The New Haven Trustee asserts that these issues have already been decided by the United States District Court for the District of Connecticut, which has jurisdiction over the New Haven reorganization.

I. Background

On March 6, 1962, the Pennsylvania Railroad Company and the New York Central Railroad Company made application to the Interstate Commerce Commission under Section 5(b) of the Interstate Commerce Act (49 U.S.C. §5(b)

(1) for approval of a proposed merger of the two railroads into what ultimately became the Penn Central Transportation Company, the Debtor herein.

On June 26, 1962, the New Haven, then in reorganization for the second time in less than 20 years, sought inclusion in the merger. Eventually, over the objections of the merger proponents, the Commission, by its order of April 6, 1966, made its approval of the merger conditional upon inclusion of the New Haven, on terms to be negotiated by the parties, subject to the approval of the I.C.C. and the New Haven reorganization court. 327 ICC 475, 553. It was recognized that any attempt to recapitalize the New Haven and include it as an operating company would be pointless, in view of its hopelessly deteriorating financial condition. Accordingly, the outright sale of the New Haven's assets was the method of inclusion selected. This transaction was to constitute the first step of a two-step reorganization plan for the New Haven. *New Haven Inclusion Cases,* 399 U.S. 392, 410 at n. 45 (1970).

The New Haven Trustee and the merger proponents originally agreed that a fair purchase price for the New Haven assets would be $125,000,000. The Commission also approved this price,[1] which was to be paid by a "package" consisting of $8,000,000 in cash, $23,000,000 in (divisional) first mortgage bonds, the assumption of certain New Haven liabilities, closing adjustments, and the issuance of shares of common stock in the new corporation. The parties, and the Commission, valued the common stock at $87.50 per share; thus the stock constituted the major part of the consideration flowing to the New Haven estate. It is conceded that this feature of the transaction was eagerly sought by the New Haven estate.

While the transaction as thus formulated was designed to produce the equivalent of $125,000,000 for the New Haven

[1] 331 ICC 627, 692.

estate, the Commission further found that it would cost Penn Central the equivalent of $157,000,000, largely because of the interim and continuing losses of the New Haven which the Penn Central would be required to assume. Thus, Penn Central would pay $157,000,000 in exchange for assets having only negative earning power. But, apparently convinced that the merger would "save" upwards of $80,000,000 per year, the Commission concluded that the inclusion of the New Haven on the above terms "would be both 'just and reasonable' as a condition of the merger under §5 . . . and 'fair and equitable' as part of a plan of reorganization under §77. . . ." *New Haven Inclusion Cases*, 399 U.S. 392, 413 (1970).

At this point, procedural complications developed. The I.C.C. order was subject to dual review: in the Connecticut District Court, and in a three-judge statutory court in the Southern District of New York. The former had jurisdiction over the reorganization of the New Haven, the latter over the merger (and the related inclusion) under §5 of the Interstate Commerce Act. Appeals were taken to both courts, by New Haven creditor groups asserting that the price was too low, and by various parties opposed to the merger, the New Haven inclusion, or both.

The Connecticut Court concluded that the New Haven assets were worth between $33,000,000 and $55,000,000 more than the agreed price, *In re New York, N.H. & H.R.R.*, 289 F.Supp. 451, 465 (D.C. Conn. 1968), while the merger court concluded that the deficiency was in the range of $45,000,000 to $50,000,000. *N.Y., N.H. & H.R.R., First Mtg. 4% Bondholders' Committee v. United States*, 289 F.Supp. 418, 440 (S.D.N.Y. 1968).

On remand, again in a combined proceeding involving both the merger and the reorganization, the I.C.C. increased the price by some $37,700,000, but allowed certain further

deductions totaling $22,100,000, thus producing a net price increase of $15,600,000. The total price set by the Commission was approximately $145,600,000. The increase was to be paid by issuing $7.4 million more of divisional mortgage bonds, and by assuming certain additional liabilities.

By this time, the New Haven was in such desperate straits that cessation of rail services appeared imminent. Accordingly, the I.C.C. concluded that the assets should be immediately transferred to Penn Central, and Penn Central should be required to take over the New Haven's operations, without awaiting final judicial review of the price. This was accomplished, pursuant to the I.C.C. opinion and an order of the New Haven reorganization court, as of December 31, 1968, by an outright conveyance to Penn Central "free and clear of liens." The price set by the I.C.C. was paid, subject to adjustment on appeal.

On the second round of appeals, the merger court generally upheld the I.C.C., but made some adjustments which increased the price by about $990,000. *N.Y., N.H. & H.R.R., First Mtg. 4% Bondholders' Committee v. United States,* 305 F. Supp. 1049 (S.D.N.Y. 1969). This, too, was paid. However, the reorganization court increased the price by some $29,000,000. *In re N.Y., N.H. & H.R.R.,* 304 F. Supp. 793 and 304 F. Supp. 1136 (D. Conn. 1969).

When the merger was originally approved in 1966, in hearings before the I.C.C. the median projected price of Penn Central stock was $87.50. By the time of the conveyance of the New Haven assets on December 31, 1968, the price had declined to an average of about $69.50 per share, *see: New Haven Inclusion Cases,* 399 U.S. at 485, but all concerned apparently felt that the long-range benefits of the merger would improve the market. Accordingly, in authorizing the New Haven Trustee to accept 950,000 shares of Penn Central stock as representing payment of $83,125,000

of the purchase price, the Connecticut court imposed on Penn Central an underwriting plan which in effect required Penn Central to guarantee that the stock would reach $87.50 per share by February 1, 1978; otherwise, Penn Central would pay the New Haven Trustee the difference in cash. *See* 304 F.Supp. at 808-810.

Appeals from the orders of both courts were pending before the Supreme Court when the Penn Central went into bankruptcy. Eight days later, on June 29, 1970, the Supreme Court decided the pending appeals. *New Haven Inclusion Cases*, 399 U.S. 392 (1970). The Court (a) affirmed the New Haven reorganization court's determination that the correct price for the New Haven assets was $174,000,000; (b) vacated that part of the reorganization court's judgment which set up the underwriting plan; and (c) directed the merger court to abstain "pending the further proceedings before the I.C.C. and the reviewing courts under Section 77 of the Bankruptcy Act."

As can be seen from the foregoing recital, there were two separate issues involved throughout these proceedings: the value of the New Haven assets, and the value of the consideration to be furnished by Penn Central. When the I.C.C. and the lower courts considered the case, the value of the assets was decreasing, even negative; whereas the value of the consideration was thought to be likely to increase. By discarding going-concern, or income-producing approaches, and choosing a liquidation hypothesis, the reorganization court established a floor under the declining asset value. And its underwriting provision was designed to insure that the consideration value would correspond to the price thus fixed.

By the time the Supreme Court decided the case it was apparent that the underwriting scheme was no longer feasible.

II. The Issues

Before attempting to discuss the precise extent of this Court's jurisdiction and the desirability *vel non* of its exercise, it may be helpful to review the issues which, in consequence of the Supreme Court's decision, remain open for further consideration. Unfortunately, even this subject is not free from doubt.

It is clear that the value of the New Haven assets which were conveyed to Penn Central as of December 31, 1968, has been finally and unalterably fixed at $174,000,000. If the "package" of consideration previously furnished by Penn Central were to be valued as of the time of payment and treated as an accomplished fact, then the only remaining issue would be the form of payment of the $28,000,000 balance. But the Court has expressly stated that, in the light of intervening events, the underwriting scheme which was designed to produce a value of $87.50 per share of the common stock "may be wholly unrealistic." From this it can be argued, either that the Court intended that only the underwriting scheme should be reconsidered, or that the true value of the "package" as of December 31, 1968, should be reappraised in the light of subsequent events, or that the entire "package" should be reevaluated as of present day values. There is language in the Court's opinion which can be construed as lending support to each of these possible constructions.

The Court stated, 399 U.S. 392, at p. 489:

"Accordingly, we set aside the order of the Connecticut District Court *insofar as it determines that an intrinsic value of $87.50 inheres in the Penn Central common stock and implements an underwriting plan to secure payment of that sum.* Further proceedings before the Commission and the appropriate federal courts will be necessary to determine the form that Penn Central's consideration to

> New Haven should properly take and the status of the New Haven estate as a shareholder or creditor of Penn Central." [emphasis added]

However, immediately preceding this language, the Court stated (pp. 488-89):

> "The fairness and equity that are the essence of a Section 77 proceeding forbid our approval of a payment for the transferred New Haven properties that may be worth only a fraction of its purported value. And the same considerations of fairness and equity prevent imposing on Penn Central the burden of immediate payment in full, particularly when it is remembered that the New Haven bondholders have never objected to the receipt of Penn Central stock in exchange for the New Haven assets."

Elsewhere (at pp. 489-90), in discussing the constitutional rights of the bondholders, the Court stated:

> ". . . The purchase price that the Commission and the reorganization court have required Penn Central to pay to the New Haven estate is based upon the liquidation value of the seller's assets, appraised as of December 31, 1966. That price hypothesizes a shutdown of New Haven followed by a sell-off of its assets at their highest and best value. In the circumstances of this case, and for the reasons we have already set out at length, we agree with the reorganization court that it would be unfair and inequitable to allow Penn Central to take the properties for any lesser sum. Moreover, *we today require a reassessment of the consideration* that Penn Central is to give in exchange for those properties. We thereby accord the bondholders the right to a liquidation and a per parcel sale that is theirs by virtue of their mortgage lien. . . ." [emphasis added]

And finally, there is at least surface inconsistency between the Court's language at page 488:

"... But we cannot avoid the impact of recent events in assessing the propriety of the decree that [the reorganization] court has entered. . . ."

and the express disclaimer set forth in a prefatory footnote in which, after noting the commencement of Penn Central's reorganization proceeding, the Court stated:

"Whether the financial obligations dealt with in the present opinion may become subject to modification in or because of those proceedings is a question with which the present opinion in no way deals."

In view of the fact that the opinion was filed shortly after Penn Central's bankruptcy, and that the implications of the bankruptcy had not been briefed or argued, it may well be that the "recent events" mentioned in the text referred to the pre-bankruptcy decline in Penn Central's fortunes, and not to the bankruptcy itself. Another possible way to reconcile these two comments might be to construe the Supreme Court's mandate as directing that the underwriting scheme, or the valuation of the entire package of consideration, must be reconsidered by reason of the intervening bankruptcy, but without any attempt on the part of the Court to suggest what effect, if any, the intervening bankruptcy should have on the result. Or, the Court may merely have wished to make clear that, whatever the outcome of its mandated reevaluation, various parties in interest in the Penn Central reorganization proceeding would still be able to challenge it in this reorganization proceeding.

To summarize, the issues which remained to be decided after the Court's action include at least (1) the method of payment of the $28,000,000 increase; (2) the underwriting scheme, or a substitute therefor; (3) whether the stock transaction can or should be rescinded, or recast; (4) whether the New Haven estate can or should be accorded the status of a secured creditor with respect to some or all of the further consideration to be furnished; and (5) the

treatment to be accorded whatever claims emerge from decision of the foregoing issues, in the Penn Central bankruptcy proceeding.

III. Post-Bankruptcy Events

Since the opinion of the Supreme Court was handed down, the litigation has followed a potentially awkward course both in this court and in Connecticut court, generating the specific controversies which this court is now asked to consider. In this court, the New Haven Trustee, in May of 1971, filed a proof of claim, as a secured creditor, in the sum of $132,000,000. This amount was arrived at by deducting from the $174,000,000 total purchase price approved by the Supreme Court the various cash payments which have been made and certain obligations assumed by Penn Central. Thus, the New Haven proof of claim asserts that the New Haven is a secured creditor for the full balance of the purchase price, plus interest thereon, without any adjustment for the 950,000 shares of Penn Central stock.

The Connecticut court filed an opinion and on June 11, 1971, entered an order,[2] which, in remanding the case to the Interstate Commerce Commission, imposed an "equitable lien" in favor of the New Haven, upon all of the former New Haven assets conveyed to Penn Central (except rolling stock) for the full balance of the purchase price (*i.e.*, $174,000,000, less cash payments on account and obligations assumed, declared the existence of a "constructive trust" in one-half of the income from the Grand Central Terminal properties in New York, in the sum of $28,000,000; concluded that the 950,000 shares of Penn Central stock and the Divisional First Mortgage Bonds which were part of the original purchase price paid in 1968 should now be regarded

[2] *See: In re N.Y., N.H. & H.R.R.*, 330 F.Supp. 131; 331 F.Supp. 212 (D. Conn., 1971).

as being held merely as security for the payment of the full balance; and directed the Interstate Commerce Commission to implement these provisions in carrying out its mandate. The Connecticut court also, acting on its own motion, designated a named attorney as the representative of the court to take immediate steps to record the "equitable lien" wherever necessary under state law, in the four states in which the former New Haven assets were thought to be located. An appeal from these orders is now pending before the Court of Appeals for the Second Circuit.

The Trustees of the Debtor sought interim relief in this Court from certain aspects of the Connecticut court's order. By Order No. 296, this request was granted in part, in an order directed only to the litigants, and those in privity with them, and designed only to preserve the *status quo* pending ultimate resolution of these issues, by prohibiting any attempts to exact payment. An appeal from this order is now pending before the Court of Appeals for the Third Circuit.

At the same time, the Trustees filed the present application, seeking an immediate determination by this court of the merits of the New Haven Trustee's proof of claim. At the hearing on this application, the New Haven Trustee relied solely upon the opinion and order of the Connecticut court in support of its proof of claim. (Tr. 2730.)

It would be naive to ignore the potential for unseemly conflict between courts of coordinate jurisdiction which inhere in these circumstances and events. On the other hand, however, care must be taken not to exaggerate or unduly emphasize such potential conflict. Where related controversies, or different aspects of the same controversy, are properly presented to two courts for decision, it is sometimes necessary for both courts to express their views. *Cf. Dellinger v. Mitchell*, 442 F.2d 782, 787-88 (D.C. Cir. 1971).

The applications now pending in this court cannot be simply ignored, and they cannot be disposed of without considering the jurisdictional and other issues presented. The unique and complex relationship between the two reorganization proceedings, in my judgment, makes it necessary for both courts to decide their respective portions of the issues presented, in the interests of expediting final and conclusive resolution of all of the issues involved in the entire litigation. Every reasonable effort should be made, of course, to minimize differences.

IV. Jurisdiction

As noted above, the Supreme Court held that "further proceedings before the Commission and the appropriate federal courts will be necessary to determine the form that Penn Central's consideration to New Haven should properly take and the status of the New Haven estate as a shareholder or creditor of Penn Central." From the use of the plural ("courts"), and the fact that the Supreme Court directed the merger court to abstain, it can be argued that the opinion contemplated that this court would be involved in the ultimate determination of some or all of the issues remaining open. Nevertheless, it must be recognized that the litigation in which the opinion was rendered did not originate in this court, and that the Supreme Court's mandate was directed to the Connecticut court. In view of the language quoted above, and the disclaimer in the prefatory footnote at the beginning of the Supreme Court's opinion, this much at least is certain: the Supreme Court has not suggested that this court should refrain from carrying out its functions under the reorganization statute.

In the ordinary course of reorganization, this court, pursuant to Section 77(c)(7) of the Bankruptcy Act, is required to determine the amount of an unliquidated debt, decide whether the claim is secured or unsecured, and

classify the various claimants "according to the nature of their respective claims and interests" for purposes of the reorganization plan. 5 *Collier on Bankruptcy*, §§77.20, 77.21; 6A *Collier on Bankruptcy*, §9.02. In carrying out these functions, this court would be bound by principles of *res judicata* and full faith and credit. To the extent that the judgment of the Connecticut court became final, either before bankruptcy or by virtue of the Supreme Court's affirmance shortly after bankruptcy, no question arises. But to the extent that additional obligations are sought to be imposed, or additional liens created, after Penn Central's bankruptcy, without the consent or approval of this Court, very serious jurisdictional questions appear. Trustees have never been made parties to the proceedings in the Connecticut District Court, nor has anyone sought leave of this court to proceed against them in that regard.

Perhaps this is but another way of pointing out that, since the New Haven assets were conveyed to Penn Central free and clear of all liens, including all claims of the New Haven estate, on December 31, 1968, and since they remained in the ownership and possession of Penn Central on the date of bankruptcy, the filing of Penn Central's reorganization petition vested exclusive jurisdiction over these assets in this court, and made it jurisidictionally impossible for any other court to impose liens upon them, except with the approval of this court.

Counsel for the New Haven Trustee suggested at oral argument that one solution to this impasse would be for this court now to authorize and direct the Trustees to subject themselves to the jurisdiction of the New Haven court, and thereafter for this court to abstain until final appellate determination in the Second Circuit proceedings. While the thought of allowing the cup thus to pass has considerable appeal, this approach contains its own grave difficulties. In the first place, by the time this suggestion was made, the

proceedings in the Connecticut District Court had, to all practical intents and purposes, already terminated.[3] Whether something could have been, or could now be done to overcome this difficulty need not now be considered. For the due process rights of the Penn Central creditors present a more serious problem.

It is no answer to state that the Trustees act as representatives of the creditors of Penn Central. In a sense this is true, inasmuch as the Trustees do have the obligation to preserve the Debtor's estate for the benefit of all concerned. But the Trustees cannot adequately represent one or more groups of creditors in disputes involving relative priorities of claims.

To the extent that the New Haven Trustee seeks a post-bankruptcy adjudication which would transform its $83.1 million stock transaction into a secured claim, create a further secured claim in the sum of $28,000,000, plus interest on the aggregate sum, and establish some further type of security ("constructive trust") in certain current income of the Debtor, I am convinced that the various creditor interests of Penn Central have an absolute constitutional right to be heard before final decision.[4] I am also satisfied that the only forum in which these interests now can (or, conveniently, ever could) be heard is in the context of the Penn Central reorganization.

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[3] The Trustees did appear in some limited fashion in the Connecticut proceeding. The extent of this participation and the procedural adequacy of the proceedings are among the issues now pending on appeal in the Second Circuit.

[4] New or additional credit aggregating hundreds of millions of dollars was extended to Penn Central between December 31, 1968, and the date of bankruptcy. Additional obligations, both secured and unsecured, were incurred. These creditors may be able to establish that they relied in part upon the "free and clear" (former) New Haven assets, and that actual or constructive notice that the full purchase price was not finally settled would not constitute notice of a potential retroactive lien, especially with regard to payments already made. At least, their opportunity to attempt such proof cannot be foreclosed.

Any railroad reorganization proceeding is a complex form of litigation, and has many aspects. The New Haven reorganization is no exception. For present purposes, the Connecticut proceedings can be seen as involving the formulation and implementation of a plan of reorganization of the New Haven, a mandate from the Supreme Court, and litigation which was pending on the date of Penn Central's bankruptcy, in which claims are being asserted against Penn Central. This court has no direct concern with the first two of these three aspects, and should clearly refrain from taking any action which might infringe upon the jurisdiction of the Connecticut court. However, insofar as new or additional claims are being asserted therein against the Debtor's estate, I am required to decide whether the assertion of these claims in that forum should be permitted to continue, in view of the Penn Central bankruptcy and the stay of suits provisions of Order No. 1 herein.

As between the New Haven Trustee and the Debtor, these claims, notwithstanding their unusual ramifications, are essentially pre-bankruptcy claims, contractual in nature. They were submitted to the jurisdiction of this court when the New Haven Trustee filed his proof of claim in these proceedings, an event which occurred before the Connecticut court's adjudication.

The leading case involving the jurisdictional interplay between two railroad reorganization courts is *Warren v. Palmer*, 310 U.S. 132 (1940). The Court held that the reorganization court which had jurisdiction over the debtor in possession of leased lines could impose liens on the leased property for operating expenses, notwithstanding the fact that the lessor was also in reorganization in another court. Since the case involved largely post-bankruptcy issues, and liens which were necessary for the continued operation of rail service, the decision is not directly opposite. However, to the extent that it does bear on the present situation, it

lends support to the position of the Penn Central Trustees in this case.

Whether the present issue be regarded as a question of the exercise of this Court's discretion as to whether or not to stay pending litigation in another jurisdiction, or, independently of the "stay of suits" question, the determination as to which of two reorganization courts is the preferable forum, I am constrained to reach the somewhat uncomfortable conclusion that the ultimate decision depends to a large extent upon the result which has been or may be reached in the other jurisdiction. The usual standards to be applied in this situation—impact on the formulation of a reorganization plan and the continuance of rail service, *cf. Warren v. Palmer, supra; Gardner v. New Jersey*, 329 U.S. 565 (1947), and impact on this court's interim administration of the reorganization proceeding, *see Congress of Railway Unions, et al. Appeal*, ____ F.2d ____ (3d Cir., July 16, 1971)—must be assessed in light of the actual or threatened outcome of the pending litigation.

If the Connecticut court had simply remanded the matter to the Interstate Commerce Commission, the "form" of Penn Central's consideration and the "status" of the New Haven would presumably be determined by the Commission simultaneously in both the New Haven reorganization proceeding (including the remnants of the merger case) and in the Penn Central reorganization proceeding. It is reasonable to assume that these initial determinations would have been internally consistent. Review would then be available, in the Connecticut court in the New Haven proceeding, and in this court in the Penn Central proceeding. If the two courts then viewed the issues differently, there might be separate appeals in the two proceedings, the parties might agree upon a single appeal, or one court might defer to the other. Since the decision of each court would have had its genesis in a proceeding in which all concerned

were heard, some form of unification of the appeal process would probably be feasible. Moreover, there is every reason to suppose that the Commission, which is, after all, primarily responsible for the formulation of reorganization plans, *see Group of Institutional Investors v. Chicago, Minneapolis, St. Paul and P.R. Company*, 318 U.S. 523, 544 (1943); *Reconstruction Finance Corporation v. Denver and Rio Grande and Western Railroad Company*, 328 U.S. 495, 530 (1946), might be expected to resolve these issues in a manner which would withstand attack in both courts. As matters now stand, however (depending in part upon the outcome of the pending appeal in the Second Circuit), it is difficult to see how the Commission, confronted with the order of the Connecticut court, could properly perform its function in either proceeding.

I hasten to emphasize that the Connecticut court has made it clear that it does not view its order as in any way controlling the ultimate disposition of the New Haven Trustee's claim in the reorganization plan of the Penn Central. However, this assurance can be, and is widely interpreted by Penn Central creditor groups as being, limited to the notion that the New Haven Trustee's ultimate participation in a reorganized Penn Central would be determined in the Penn Central reorganization proceeding. The recalculated amount of the New Haven Trustee's claims, and their character as secured or unsecured, are a different matter; yet these are the critical determinations insofar as Penn Central's other creditors are concerned.

While the existence of a declared lien would ordinarily have little adverse effect upon the interim conduct of the reorganization process, if it were subject to reconsideration in the ultimate reorganization plan, the fact remains that in this case, unless the declared lien is to be simply disregarded, difficult and burdensome accounting procedures might be required. To the extent that the lien purportedly

attaches to all of the former New Haven assets (except rolling stock), whether real or personal, thus apparently even including office furniture and supplies, the interference with the orderly process of the reorganization and the operations of the Debtor in the interim is potentially quite substantial. Further, obvious difficulties arise with respect to that part of the Connecticut court's order which imposes a "constructive trust" upon substantial amounts of income now available to the Trustees for operating expenses.

For all of these reasons—the seeming incompleteness of the Connecticut court's jurisdiction, the exclusive jurisdiction of this court over the assets in the possession of the Debtor, and the probable impact upon the reorganization proceedings and the ultimate reorganization plan for Penn Central—if the issues were being presented to this court for completely independent decision, I should be inclined to stay the prosecution of these claims by the New Haven Trustee in other forums. But the Connecticut court's determination of its own jurisdiction is entitled to great weight. Considerations of comity, and due deference to the views of an eminent jurist of exceptional experience in these matters, alike dictate that every effort be made here to avoid reaching a result which might further complicate matters, or seem to interfere unduly in the other related proceeding.

When the case was before the Supreme Court, the basic issues were whether the inclusion terms were "just and reasonable" under §5 and "fair and equitable" under §77. The Court held that, inasmuch as Penn Central had agreed to the inclusion, the issue was essentially the same under both statutes, and involved the valuation of the New Haven assets, a task peculiarly within the jurisdiction of the New Haven reorganization. I shall assume that the §5 criterion is no longer open for consideration. But in the present posture of the case, determining what is "fair and equitable" from the standpoint of the New Haven reorganization, or

even from the joint standpoint of the New Haven reorganization and a solvent Penn Central in private management, is not necessarily the same as determining what is "fair and equitable" in the total context of both reorganizations.

In short, the result of the ultimate decision of the substantive issues raised here must appear to the Connecticut court to be consistent with a "fair and equitable" plan for the New Haven, and must also appear to this court to be consistent with a "fair and equitable" plan for the Penn Central. Neither court can delegate this decision to the other, nor would abstention be permissible.

Accordingly, it seems appropriate to view the Connecticut court's order of June 11, 1971, as essentially constituting a declaration of what would be consistent with a fair and equitable plan for the New Haven reorganization. But it does not, and in my view cannot, constitute a binding determination of what would be consistent with a "fair and equitable" reorganization of Penn Central.

Determining the components which will go to make up the present liquidated amount of the New Haven claims is one thing; deciding whether the various components are all entitled to the same priority is quite another.

In my judgment, the only conclusion which need now be expressed is that, whatever may be the situation as between the New Haven Trustee and the stockholders of the Debtor, I do not consider that any issues of relative priority, or of amount (except for the additional $28,000,000), have been determined with finality insofar as other creditors of Penn Central are concerned.

V. The Merits

As stated at the outset, the Trustees are pressing for an immediate ruling on the proof of claim filed in these proceedings by the New Haven Trustee. They have pre-

sented extensive argument to the effect that the lien is without legal or equitable basis, is contrary to the law of all of the states in which the property is located, and is otherwise invalid. No doubt the decision of the Second Circuit in the pending appeal will be instructive, or even dispositive, as to many of these issues.

As I view the matter, however, the merits of this claim cannot properly be determined on the present record, in any event. The present posture of the proof of claims program is such that, although the deadline for filing proofs of claim has passed, and the claims which have been filed are being classified and processed, complete lists of the claims have not yet been made a matter of record, and the deadline for filing objections to claims has not yet been fixed. While various creditor interests did get notice of the hearing on the present petition, and some creditor groups have expressed their views on the merits of the New Haven claim, many parties potentially affected thereby have had neither notice nor opportunity to express their views. I refer specifically to the unsecured creditors, who seemingly would be most directly affected by the outcome.

Moreover, as as practical matter, if a plan for Penn Central can be devised which makes adequate provision for all creditors, whether secured or not, the New Haven Trustee's claims will diminish in poignancy. And the underlying constitutional issues can be more clearly perceived and dealt with after the various valuation studies now in progress are completed.

It is a reasonable supposition that the principal objectives of the current efforts by the New Haven Trustee are (a) to insure that he will have standing to object to the sale or other disposition of any substantial portion of the former New Haven assets, or the proceeds of such sales; (b) to provide protection in the event the Penn Central reorganization

proceeding is dismissed; and (c) to insure preferred status in the event Penn Central's reorganization plan does not contain adequate provisions for unsecured claims. As set forth earlier, I am satisfied that none of these matters can be finally determined except in these proceedings, after all parties in interest have had an opportunity to be heard. However, I see no reason why reasonably adequate interim protection should not be afforded the claims of the New Haven Trustee.

Accordingly, I have concluded that, pending final determination of all of the issues involved in the appropriate forum or forums, and unless and until otherwise ordered by this court or by an appellate court of competent jurisdiction, the New Haven Trustee shall be deemed to have a tentative lien, indeterminate in amount, upon all real property all readily identifiable personal property (except rolling stock) formerly owned by the New Haven estate and conveyed to the Penn Central as of December 31, 1968, which were still in possession of the Debtor's estate on June 11, 1971. The provisions of Orders Nos. 78 and 192 shall be applicable. This, of course, does not constitute the expression of any view as to the merits of the claim or the asserted lien. The restraints imposed by Order No. 296 will remain in effect.

In order to promote the orderly and expeditious resolution of all of the issues surrounding the New Haven's claims, this court will, on application, at such time as the remand of the inclusion litigation to the I.C.C. becomes effective, certify to the Commission, for its recommendations and report, any appropriate question relating to the valuation and proper treatment of the claims of the New Haven Trustee, including, by way of illustration: (1) The value of the various items of consideration transferred by Penn Central, on the respective dates of transfer, if no value is attributed to Penn Central's obligations under the

underwriting agreement; (2) The value of Penn Central's obligations under the underwriting agreement, reappraised in the light of subsequent events; (3) The separate components of a presently fair and equitable consideration package, and the values of each.

In all other respects, disposition of the issues committed to this court must await the normal processing of the New Haven Trustee's proof of claim.

ORDER NO. 546

AND NOW, this 31st day of December, 1971, it is ORDERED:

1. That, without prejudice to the ultimate resolution of the merits of the claims asserted, the Trustee of the New York, New Haven & Hartford Railroad shall, unless and until otherwise ordered by this Court or an appellate court of competent jurisdiction, be deemed to have a lien, indeterminate in amount, and indeterminate as to priority, upon all of the real property and readily identifiable tangible personal property (exclusive of rolling stock) conveyed to Penn Central by the said New Haven Trustee as of December 31, 1968, and remaining in possession of the Trustees of the Debtor as of June 11, 1971.

2. That the provisions of Orders Nos. 78 and 192 shall be fully applicable to transactions respecting said assets.

3. That the restraints imposed by Order No. 296 shall remain in effect until further order of this Court.

4. That this Court will entertain applications for reference of appropriate issues to the Interstate Commerce Commission in accordance with the views expressed in the foregoing Opinion.

5. That the ultimate disposition of the claims asserted by the New Haven Trustee is deferred pending completion of the program for handling proofs of claim in these proceedings, and the receipt and consideration of objections in accordance with such program.

John P. Fullam
J.

United States Court of Appeals For The Third Circuit

Nos. 71-1582 and 71-1734

IN THE MATTER OF
PENN CENTRAL TRANSPORTATION COMPANY, DEBTOR

Richard Joyce Smith, Trustee of the New York, New Haven & Hartford Railroad,
Appellant in No. 71-1582

The New York, New Haven & Hartford Railroad Company First Mortgage 4% Bondholders Committee,
Appellant in No. 71-1734

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Submitted Under Third Circuit Rule 12(6)
October 22, 1971

Before ALDISERT, GIBBONS and ROSENN, *Circuit Judges*

OPINION OF THE COURT
(Filed January 3, 1972)

PER CURIAM:

These appeals originally required an interpretation of Order No. 296 of the District Court for the Eastern District of Pennsylvania, In The Matter of Penn Central Transportation Company Debtor.[1] Appellants contended initially

[1] AND NOW, this 21st day of June, 1971, upon consideration of the verified Petition of the Trustees on Matters Relating to New Haven Inclusion, the record in these proceedings, the "Memorandum of Decision on Issue of Equitable Lien and Other Matters Preliminary to Remand to Interstate Commerce Commission," filed June 11, 1971 (Memorandum Decision) by the United States District Court for the District of Connecticut (New Haven Court) in Proceedings for the Reorganization of a Railroad, No. 30226, and upon hearing had this day, it is hereby ORDERED:

that the order (1) precluded the New Haven Trustee from taking steps to apply to the United States Supreme Court for certiorari before judgment of the Court of Appeals of the Second Circuit in In The Matter of The New York, New Haven and Hartford Railroad Company, Debtor, a pending appeal from the bankruptcy court, the District Court for the District of Connecticut, No. 30226; (2) prevented them from taking necessary steps to schedule further proceedings before the Interstate Commerce Commision to implement the remand of the New Haven bankruptcy court and (3) prevented them from taking further action to record or perfect the recordation of an equitable lien.[3] After filing these appeals, the parties agreed that Order No. 296 does not prevent appellants from pursuing the course of conduct contemplated by (1) and (2).

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(1) The Trustees, by their counsel, are instructed to appear before the United States District Court for the District of Connecticut (New Haven Court) in proceedings for the reorganization of The New York, New Haven and, Hartford Railroad Company (New Haven), and to present objections to the entry of any order on, or any implementation of, the Memorandum Decision which is beyond the jurisdiction of the New Haven Court or which would interfere with the reorganization of the Debtor herein or the jurisdiction of this Court with respect thereto and to present objections on such other grounds as to the trustees or their counsel shall seem appropriate; and the Trustees are further instructed to advise the New Haven Court that their participation in such proceedings is without prejudice to the primary jurisdiction of this Court in the reorganization of the Debtor; and the Trustees are instructed to institute appropriate proceedings in this Court or elsewhere in aid thereof.

(2) The Trustee of the property of The New York, New Haven and Hartford Railroad Company. The Fidelity Bank, all other persons claiming an interest in the New Haven estate, the officers, agents, servants, employees and attorneys of any of them, and all other persons, firms or corporations, whatsoever and wherever situated, and whether a party to these proceedings or not, are hereby enjoined from taking any action which would enforce, collect or cause to be perfected or paid any claim against the Debtor or its estate arising out of the inclusion of the New Haven into the Debtor, other than in these proceedings, or which would interfere with the primary jurisdiction of this Court to deal with properties in its possession or under its control pending further order of this court.

(3) The Trustees are directed to continue to divide all income derived from properties formerly owned by the New Haven and from the so-called "Grand Central Terminal Properties" to defray current expenses of the Debtor's estate as heretofore or hereafter ordered by this Court.

(5) A hearing is set in this Court at 10:30 a.m. on the 29th day of Jan., 1971, at the United States Courthouse, Ninth and Market Streets, Philadelphia, at which time this Court will consider whether it should adjudicate, and may adjudicate the rights of the Trustees in the properties conveyed to the Debtor by the Trustees of The New York, New Haven and Hartford Railroad Company, in the Grand Central Terminal Properties, and in the income therefrom, and will determine whether or not to continue the foregoing relief, and to consider such other or further relief as may be required to preserve and effectuate the jurisdiction of this Court.

* * *

[3] The New Haven bankruptcy court "recapitulate[d] its principal rulings as follows: that it has plenary jurisdiction to construe and implement the mandate of the Supreme Court; that this obligates the Penn Central Trustees to see that the New Haven estate is fully compensated for the remaining balance of $132 million; and that under the unusual circumstances of this case this court should and does declare an equitable lien in favor of the New Haven on the tangible property, exclusive of rolling stock, conveyed by it to Penn Central and also declares a constructive trust, in the New Haven's favor, to the extent of the capitalized value of one-half of the excess income received from the Grand Central properties. It remands the plan of reorganization to the Interstate Commerce Commission to carry out and implement this court's adjudication."

Subsequent to a Prehearing Conference, called by the court pursuant to F.R.A.P. 33, the parties conferred with the district court, at our suggestion, on any restrictions relating to point three, and were advised:

> In my opinion, neither the New Haven Trustee nor his counsel, nor anyone else acting at their request or suggestion, could take any further action to record or perfect the recordation of the "equitable lien" without violating Order No. 296 as it now stands. Accordingly, if these activities were to be permitted, a modification of Order No. 296 would be required. It would be necessary for someone to make application for such amendment, and there would have to be a hearing at which the views of all interested parties could be presented.
>
> I believe it would be in appropriate for me to give any indication of whether such amendment would be approved, in the absence of a formal application, and

without having heard the views expressed at such a hearing. I do not know whether your conference with the Third Circuit panel would justify the conclusion that this issue should be dealt with somewhat less formally than I have just indicated. But even if this question could be disposed of informally, I do not believe I have any jurisdiction to amend Order No. 296 while an appeal is pending.

We believe that the ends of justice will be best served by remanding these proceedings to the district court to afford appellants the opportunity to make application for a modification of Order No. 296.

The appeals will be dismissed without prejudice and the proceedings will be remanded to the district court.

A True Copy:
Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

In The United States District Court For The Eastern District of Pennsylvania

IN THE MATTER OF
PENN CENTRAL TRANSPORTATION COMPANY, DEBTOR
In Proceedings for the Reorganization of a Railroad
No. 70-347

ORDER NO. 552

AND NOW, this 7th day of January, 1972, it is ORDERED that the Opinion in support of Order No. 546 (document no. 2440) is amended as follows:

1. The sentence beginning at line 10, on page 5, shall read: "When the merger was originally approved in 1966, in hearings before the ICC the median projected price of Penn Central stock was $87.50."

2. In line 22 on page 5, the word "again" shall be deleted.

3. In lines 18 and 19, on page 10, the phrase "the face value of the mortgage bonds which have been issued," shall be deleted.

4. Lines 5 and 6 on page 11 shall read: "(i.e., $174,000,000, less cash payments on account and obligations assumed); declared the".

5. In line 10 on page 11, after the word "stock" the words "and the Divisional First Mortgage Bonds" shall be inserted.

In The United States District Court For The Eastern District of Pennsylvania

IN THE MATTER OF
PENN CENTRAL TRANSPORTATION COMPANY, DEBTOR
In Proceedings for the Reorganization of a Railroad

No. 70-347

MOTION OF NEW HAVEN TRUSTEE TO VACATE ORDER NO. 296

Richard Joyce Smith, Trustee of the New York, New Haven and Hartford Railroad Company, Debtor ("New Haven Trustee"), hereby moves that this Court vacate its Order No. 296, dated June 21, 1971, and in support thereof states the following:

1. The New Haven Trustee and the New York, New Haven and Hartford Railroad Company First Mortgage Four Percent Bondholders' Committee ("Committee") made timely appeals from Order No. 296 to the United States Court of Appeals for the Third Circuit. After briefs had been filed by all parties, and a Motion by the Penn Central Trustees to dismiss the New Haven Trustee's appeal had been denied, argument was postponed by the Court of Appeals under circumstances then brought to the attention of this Court. On January 3, 1972, the appeals from Order No. 296 were dismissed by the Court of Appeals without prejudice with a suggestion relating to the injunctive portion of Order No. 296.

2. On December 31, 1971, this Court entered its opinion and Order No. 546, in which reference was made to Order No. 296 as "an Order directed only to the litigants,

and those in privity with them" (mimeo, page 11). The proceedings to which Order No. 546 was addressed were then referred to by the Court as follows:

> "At the same time, the Trustees filed the present application, seeking an immediate determination by this Court of the merits of the New Haven Trustee's Proof of Claim" (mimeo, page 12).

3. While Order 546 was thus described, the Court nevertheless provided therein that the restraints imposed by Order No. 296 would remain in effect until further order of this Court.

4. The New Haven Trustee contended in the proceedings before this Court upon which Order No. 296 was entered that such proceedings constituted an invalid, collateral attack upon the judgment of the United States District Court for the District of Connecticut described in Order No. 296. The same contentions were made specifically by the New Haven Trustee in the proceedings in the Court of Appeals.

5. The New Haven Trustee presently intends to file a Notice of Appeal not later than January 28, 1972, from Order No. 546, and, unless there is a favorable ruling by the Court on this Motion, would intend at the same time again to appeal from Order No. 296.

6. By reason of the suggestion of the Court of Appeals in dismissing without prejudice the appeals from Order No. 296, the factual circumstances that such dismissal was subsequent to the entry of Order No. 546, but presumably without knowledge of the Court of Appeals of the entry of Order No. 546, and the specific incorporation in Order 546 of the injunctive provisions of Order No. 296, there are procedural issues fairly requiring resolution by this Court prior to the exercise by the New Haven Trustee

of his rights to seek appellate review of Order No. 546, and, unless the same is vacated, Order No. 296.

7. The New Haven Trustee submits that the provisions of Order No. 546 should be clarified by this Court so that, if Order No. 296 is intended to be moot except for the injunctive provisions, it should now specifically be vacated in its entirety. Any injunctive orders intended by the Court as part of Order No. 546 should be provided in Order No. 546, rather than by incorporation by reference to Order No. 296.

8. If Order No. 296 (apart from the injunctive provisions) was not intended by this Court to be mooted by Order No. 546, this motion could be denied and the New Haven Trustee would, as above indicated, seek appellate review of both Orders.

9. Since the time within which to file a Notice of Appeal from Order No. 546 will expire January 31, 1972, the New Haven Trustee urgently prays that this Court rule upon this Motion prior to January 28, 1972, so that it will not be necessary to institute appellate procedures prior to a ruling on this Motion.

10. The Committee has requested that the Court be advised that it wishes to be considered as having joined in this Motion.

Respectfully submitted,

RICHARD JOYCE SMITH
Trustee of the New York,
New Haven and Hartford Railroad
Company, Debtor

by his attorney, TATE & ERVIN

January 14, 1972

B-100

In The United States District Court For The Eastern District of Pennsylvania

IN THE MATTER OF
PENN CENTRAL TRANSPORTATION COMPANY, DEBTOR
In Proceedings for the Reorganization of a Railroad

REPLY OF TRUSTEES TO MOTION OF NEW HAVEN TRUSTEE TO VACATE ORDER NO. 296

The Trustees hereby reply as follows to the Motion of Richard Joyce Smith, Trustee of the New York, New Haven & Hartford Railroad Company, Debtor ("New Haven Trustee"), dated January 14, 1972 as follows:

1. The New Haven Trustee moves this Court to vacate Order No. 296, but shows no reason why such action by this Court would be appropriate or necessary.

2. Order No. 546 is plain and requires no "clarification."

3. The New Haven Trustee professes uncertainty as to whether all of Order No. 296 is continued in effect or only what he calls the "injunctive provisions" thereof. No such uncertainty is warranted. Order No. 546 appropriately provides (paragraph 3) "that the restraints imposed by Order No. 296 shall remain in effect until further order of this Court." Plainly the "restraints" in question are those set forth in paragraphs 2, 3 and 4 of Order No. 296. The

other paragraphs of that order impose no restraints but relate solely to events which are now past.

WHEREFORE, the Trustees respectfully request that the New Haven Trustee's Motion be denied.

Respectfully submitted,

CHARLES A. HORSKY
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Special Counsel for the Trustees

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JOHN F. DEPODESTA
Reorganization Attorney
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B-102

In The United States District Court For The Eastern District of Pennsylvania

IN THE MATTER OF
PENN CENTRAL TRANSPORTATION COMPANY, DEBTOR
In Proceedings for the Reorganization of a Railroad
No. 70-347

ORDER NO. 565

AND NOW, this 25th day of January, 1972, upon consideration of the "Motion of New Haven Trustee to Vacate Order No. 296," it is ORDERED that said Motion be and it hereby is DENIED, without prejudice to the right of the movant to seek modification of Order No. 296, Order No. 546, or both, pursuant to the opinion of the Court of Appeals of the Third Circuit, filed January 3, 1972, in Appeals Nos. 71-1582 and 71-1734.

JOHN P. FULLAM
Judge

B-103

United States Court of Appeals
For The Third Circuit

Nos. 71-1582 and 71-1734

IN THE MATTER OF:
PENN CENTRAL TRANSPORTATION COMPANY, DEBTOR
RICHARD JOYCE SMITH, TRUSTEE OF THE NEW YORK
NEW HAVEN & HARTFORD RAILROAD,
Appellant in No. 71-1582

THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY
FIRST MORTGAGE 4%
BONDHOLDERS COMMITTEE,
Appellant in No. 71-1734

(D. C. Bankruptcy No. 70-347)
ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: ALDISERT, GIBBONS and ROSENN, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and submitted under Third Circuit Rule 12(6).

On consideration whereof, it is now here ordered and adjudged by this Court that these appeals be, and the same are hereby dismissed without prejudice, and the proceedings remanded to the said District Court, in accordance with the opinion of this Court. Costs taxed against appellants.

ATTEST:

Clerk

January 3, 1972

Certified as a true copy and issued in lieu
of a formal mandate on February 11, 1972.

TEST:
Clerk, United States Court of Appeals
for the Third Circuit.

E COPY

SEP 13 1972

MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-356

In the Matter of
Penn Central Transportation Company, Debtor
Richard Joyce Smith, Trustee of the Property of The New York, New Haven and Hartford Railroad Company, Debtor
Petitioner,

vs.

George P. Baker, Richard C. Bond, Jervis Langdon, Jr. and Willard Wirtz, Trustees of the Property of Penn Central Transportation Company, Debtor; Bankers Trust Company as Mortgage Trustee; and Morgan Guaranty Trust Company of New York as Mortgage Trustee;
Respondents.

Response of Lawrence W. Iannotti, Successor Trustee Under the First and Refunding 4% Mortgage Bonds, Dated as of July 1, 1947, of The New York, New Haven And Hartford Railroad Company in Support of Petition for Writ of Certiorari Before Judgment to the United States Court of Appeals for the Third Circuit

Lawrence W. Iannotti,
Irving S. Schloss,
205 Church Street,
New Haven, Connecticut

Of Counsel

Tyler, Cooper, Grant, Bowerman & Keefe,
205 Church Street, New Haven, Connecticut

Cohen, Shapiro, Polisher, Shiekman & Cohen,
Twelve South Twelfth Street,
Philadelphia, Pennsylvania.

September 12, 1972

THE MACK CO., NORTH HAVEN, CONN.

In The

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-356

In the Matter of
Penn Central Transportation Company, Debtor
Richard Joyce Smith, Trustee of the Property of The New York, New Haven and Hartford Railroad Company, Debtor
Petitioner,

vs.

George P. Baker, Richard C. Bond, Jervis Langdon, Jr. and Willard Wirtz, Trustees of the Property of Penn Central Transportation Company, Debtor; Bankers Trust Company as Mortgage Trustee; and Morgan Guaranty Trust Company of New York as Mortgage Trustee;
Respondents.

Response of Lawrence W. Iannotti, Successor Trustee Under the First and Refunding 4% Mortgage Bonds, Dated as of July 1, 1947, of The New York, New Haven And Hartford Railroad Company in Support of Petition for Writ of Certiorari Before Judgment to the United States Court of Appeals for the Third Circuit

STATEMENT OF THE CASE

Respondent adopts the Statement of the Case set out in Richard Joyce Smith's petition at pages 4-10.

ARGUMENT

This response is submitted in support of the petition for a writ of certiorari before judgment to the United States Court of Appeals for the Third Circuit (hereinafter referred to as the "Third Circuit") filed by Richard Joyce Smith, Trustee of the Property of The New York, New Haven and Hartford Railroad Company (hereinafter referred to as "The New Haven Trustee") in No. 72-356, *In the Matter of Penn Central Transportation Company, Debtor.*

As noted on page 9 of the aforesaid petition, appeals were taken from the orders of the Penn Central Reorganization Court by certain New Haven bondholder interests. Lawrence W. Iannotti, Successor Trustee under the First and Refunding Mortgage Bonds, was one of the appellants referred to therein. He supports the New Haven Trustee's petition for the reasons there expressed.

As indicated in the petition of Lawrence W. Iannotti filed in No. 71-1451, *In the Matter of The New York, New Haven and Hartford Railroad Company, Debtor,* a companion case presently before this Court, and as restated in the New Haven Trustee's petition, the Second Circuit's decision, *In re New York, New Haven and Hartford Railroad Company,* 457 F.2d 683 (1972), A5-A24, held that the New Haven Reorganization Court had lacked jurisdiction upon remand from this Court to declare an equitable lien and constructive trust. The Second Circuit's decision and the Orders entered in the Penn Central Reorganization Court from which the New Haven Trustee's petition originates all hinge upon the proper construction to be given the exclusivity of jurisdiction provision of Section 77(a) of the Bankruptcy Act, 11 U.S.C. §205(a) (1970).

In its Memorandum of Decision, the New Haven Reorganization Court distinguished between its jurisdictional sphere and the Penn Central Reorganization Court's by stating that it only had the power to declare an equitable lien and constructive trust, but that the determination of how these security devices would be enforced and their priority in the Penn Central reorganization remained the Penn Central Reorganization Court's sole prerogative. When the issue of jurisdiction was re-litigated in the Penn Central Reorganization Court, the court held in Order No. 546 that it could not resolve the jurisdictional tangle created by the presence of two reorganization courts with exclusive jurisdiction over virtually identical issues involving their respective Debtors. The Penn Central Reorganization Court declared,

> In short, the result of the ultimate decision of the substantive issues raised here must appear to the Connecticut court to be consistent with a "fair and equitable" plan for the New Haven, and must also appear to this court to be consistent with a "fair and equitable" plan for the Penn Central. *Neither court can delegate this decision to the other, nor would abstention be permissible.* (Emphasis added) *In re Penn Central Transportation Company*, 337 F. Supp. 779, 789 (E.D. Pa. 1971), B-87.

As the court stated, it was "constrained to reach the somewhat uncomfortable conclusion that the ultimate decision [as to which of two reorganization courts is the preferable forum] depends to a large extent upon the result which has been or may be reached in the other jurisdiction". *Id.* at 788, B-84.

Separate, then, from the *res judicata* and collateral estoppel issues raised by Order No. 546 discussed in the New Haven Trustee's petition, Order No. 546 presents another aspect of the jurisdictional problems which, as described in the petition

in No. 71-1451, merit this Court's attention. Order No. 548, read in conjunction with the Second Circuit's decision, requires a ruling as to the two reorganization courts' jurisdiction and functions under Section 77(a) and the proper working interrelationship between reorganization courts. Simultaneous review of the Second Circuit litigation and the Penn Central Reorganization Court's decision would also be advantageous because the results reached by the Second Circuit and the Penn Central Reorganization Court differ markedly, especially on the future role of the New Haven Reorganization Court. Though not a conflict of the circuits strictly speaking, this disagreement, which is illustrative of the type of difficulties which may continue to arise absent some direction from this Court as to the respective roles of the courts involved in the two reorganizations, should be resolved by this Court as expeditiously as possible.

Thus, the simultaneous presence of the Second Circuit's and the Penn Central Reorganization Court's decisions before this Court would permit this Court an opportunity to rule upon these jurisdictional issues in a more definitive manner than would consideration of each decision in isolation. As stated in the petition filed in No. 71-1451, the fact that then six and now seven railroads in the eastern portion of the United States are presently in reorganization is another factor underscoring the public importance of an authoritative decision by this Court delineating the outer reach of Section 77(a) and the boundaries of authority between reorganization courts.

As the New Haven Trustee's petition also demonstrates, the Third Circuit litigation raises fundamental questions involving *res judicata* and collateral estoppel which have significance for the efficient functioning of our judicial system. These is-

sues are intimately related to the jurisdictional problems alluded to above, but cannot and should not be separated by review in discrete cases.

CONCLUSION

For these reasons, this respondent supports the New Haven Trustee's petition filed in No. 72-356 for a writ of certiorari before judgment to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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IRVING S. SCHLOSS.

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FILE COPY No. 72-356

SEP 28 19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

IN THE MATTER OF PENN CENTRAL TRANSPORTATION COMPANY, *Debtor*

RICHARD JOYCE SMITH, Trustee of the Property of the New York, New Haven and Hartford Railroad Company, Debtor, *Petitioner*,

v.

GEORGE P. BAKER, RICHARD C. BOND, JERVIS LANGDON, JR., and WILLARD WIRTZ, Trustees of the Property of Penn Central Transportation Company, Debtor; BANKERS TRUST COMPANY, as Mortgage Trustee; and MORGAN GUARANTY TRUST COMPANY, as Mortgage Trustee, *Respondents*

On Petition for a Writ of Certiorari Before Judgment to the United States Court of Appeals for the Third Circuit

BRIEF FOR GEORGE P. BAKER, RICHARD C. BOND, JERVIS LANGDON, JR., AND WILLARD WIRTZ, TRUSTEES OF THE PROPERTY OF PENN CENTRAL TRANSPORTATION COMPANY, DEBTOR, IN OPPOSITION

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Special Counsel for the Trustees

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-356

IN THE MATTER OF PENN CENTRAL TRANSPORTATION COMPANY, *Debtor*

RICHARD JOYCE SMITH, Trustee of the Property of the New York, New Haven and Hartford Railroad Company, Debtor, *Petitioner*,

v.

GEORGE P. BAKER, RICHARD C. BOND, JERVIS LANGDON, JR., and WILLARD WIRTZ, Trustees of the Property of Penn Central Transportation Company, Debtor; BANKERS TRUST COMPANY, as Mortgage Trustee; and MORGAN GUARANTY TRUST COMPANY, as Mortgage Trustee, *Respondents*

On Petition for a Writ of Certiorari Before Judgment to the United States Court of Appeals for the Third Circuit

BRIEF FOR GEORGE P. BAKER, RICHARD C. BOND, JERVIS LANGDON, JR., AND WILLARD WIRTZ, TRUSTEES OF THE PROPERTY OF PENN CENTRAL TRANSPORTATION COMPANY, DEBTOR, IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court for the Eastern District of Pennsylvania (App. B-70-B-91 *), as

* All Appendix references are to the Appendix filed by petitioner with his petition for certiorari.

amended on January 7, 1972 (App. B-96), was entered on December 31, 1971, and is reported at 337 F.Supp. 779.

JURISDICTION

Petitioner's appeals to the Court of Appeals for the Third Circuit from several orders of the District Court have been briefed but not argued or submitted to the Court of Appeals. The jurisdiction of this Court is sought to be invoked under 28 U.S.C. Sec. 1254(1) and Rule 20 of the Rules of this Court.

STATUTES INVOLVED

Section 77(a) of the Bankruptcy Act (11 U.S.C. § 205 (a)) is set out in the Appendix to the petition in No. 71-1401 at pages A1-A4.

QUESTIONS PRESENTED

1. Whether the decision of the District Court declining an immediate adjudication of the claim of the New Haven Trustee that he was entitled to an equitable lien and a constructive trust against certain properties in the Penn Central estate, but granting protection to the New Haven Trustee pending an adjudication in an orderly fashion as a part of the adjudication of claims procedure, should be affirmed.

2. Whether any basis exists for concluding that the issue "is of such imperative public importance" as to "require immediate settlement in this Court" by review prior to decision by the Court of Appeals.

STATEMENT

The circumstances out of which the present case arose are already known to the Court, either from its opinion in *The New Haven Inclusion Cases,* 399 U.S. 392, or from the petitions and briefs filed in Nos. 71-

1401, 71-1451 and 71-1539, related proceedings which are presently pending before the Court. Our brief in opposition to certiorari in Nos. 17-1401 and 71-1451 sets out, at pages 3-13, a summary of the facts related to both those cases and the instant one, to which we respectfully refer the Court. We repeat here only those facts necessary to an understanding of the decisions of the District Court sought to be reviewed.

The recital can pick up in June 1971, when the District Court for the District of Connecticut (the New Haven court) filed an opinion in which it proposed to enter an order imposing a lien on all tangible former New Haven properties, and a constructive trust on the New Haven's former interest in certain income from Grand Central Terminal properties, all of which had been conveyed to Penn Central in December 1968, "free and clear of all liens, charges and encumbrances." Being advised of that opinion, the District Court for the District of Pennsylvania (the Philadelphia court) entered an order setting the claim of the New Haven down for hearing in July 1971, and meanwhile repeating and reaffirming its general stay order which it had entered at the outset of the Penn Central bankruptcy. This action is Order No. 296 (App. pp. B-15-B-17), one of the orders which the present petition seeks to review.

The New Haven court entered the order proposed in its opinion. The order was appealed to the Court of Appeals for the Second Circuit, and in March 1972 was reversed on the ground that the New Haven court had exceeded its jurisdiction. That decision is the subject of the petitions in Nos. 71-1401, 71-1451 and 71-1539. Meanwhile, the Philadelphia court, following a hearing, filed its own opinion and order relating to the

New Haven claim (Order 546, amended by Order 522; App. pp. B-70-B-91, B-96). The petition herein seeks review of these orders.

In summary, as we have already noted in our brief in opposition in Nos. 71-1401 and 71-1451, the Philadelphia court, *first,* concluded that the decision of this Court in the *New Haven Inclusion Cases* had not deprived it of its normal functions under Section 77, which include the responsibility..of determining the amount of an unsatisfied debt, deciding whether it is secured or unsecured, and classifying the various claimants for purposes of a reorganization plan. *Second,* it concluded (as the Court of Appeals for the Second Circuit did later) that since the New Haven assets were in the ownership and possession of Penn Central on the date of bankruptcy, the filing of Penn Central's Section 77 petition "vested exclusive jurisdiction over those assets in this [Philadelphia] court, and made it jurisdictionally impossible for any other court to impose liens upon them, except with the approval of this court." (App. p. B-81) *Third,* it noted that the New Haven Trustee had filed in May 1971 in the Penn Central proceedings a proof of claim for the same amount and with the same lien and constructive trust that it asserted in the proceedings before the New Haven court, and that the deadline for filing objections had not yet been fixed and many parties potentially affected by the New Haven claim had no notice or opportunity to object, and stated its belief that it would invade the "absolute constitutional right" of the other creditors to be heard were it now to adjudicate the New Haven claims.

Finally, it took precautions appropriate to protect the New Haven Trustee until the validity of the New

Haven claims can be determined. Its order provides (App. p. B-90):

> "That, without prejudice to the ultimate resolution of the merits of the claims asserted, the Trustee of the New York, New Haven & Hartford Railroad shall, unless and until otherwise ordered by this Court or an appellate court of competent jurisdiction, be deemed to have a lien, indeterminate in amount, and indeterminate as to priority, upon all of the real property and readily indentifiable tangible personal property (exclusive of rolling stock) conveyed to Penn Central by the said New Haven Trustee as of December 31, 1968, and remaining in possession of the Trustees of the Debtor as of June 11, 1971."

Appeals from those orders of the District Court were timely filed by petitioner, and briefing for the Court of Appeals for the Third Circuit was completed in August 1972. The appeals have not yet been heard.

ARGUMENT

The several orders of the Philadelphia court which the present petition would bring before the Court for review present no issues warranting review by the Court, and are most certainly not of the "imperative public importance" which is necessary to warrant this Court in superseding the review which will be accorded the orders by the Court of Appeals.

As the Statement above indicates, the District Court orders do not purport to adjudicate either the amount or the status of whatever claims the New Haven Trustee may have against the Penn Central estate. Indeed, as we point out in our brief in oppostion in Nos. 71-1401 and 71-1451, the whole problem of the status of the New

Haven claim remains inchoate. Neither the Commission nor any court has determined as of what date or on what basis the assets delivered by Penn Central to the New Haven in payment for its properties are to be valued. Accordingly, the amount of any unpaid claim that the New Haven may have against Penn Central is still indefinite. Neither the Commission nor any court has determined the form of the consideration that the New Haven is entitled to receive for any unpaid portion of its claim against the Penn Central estate. The Commission has not yet had an opportunity to carry forward its sensible suggestion to consolidate the Penn Central and the New Haven proceedings so that it may determine in a single and comprehensive setting what will be fair and equitable to the creditors of both estates. The Court should not, under these circumstances, undertake a resolution of the controversy.

Moreover, petitioner does not and cannot assert any threat of injury to his rights; the lien imposed by the Philadelphia court has accorded him adequate protection. The basis he does assert for invoking the extraordinary relief of certiorari before judgment is that the conclusion of the reorganization of the New Haven will be delayed, but petitioner does not suggest how a decision by this Court on the issues he seeks to bring before it would significantly shorten the New Haven reorganization proceedings. The petitioner's claims are inextricably involved in the Penn Central reorganization proceedings, and future Commission and court proceedings will be necessary before those claims can be presented to this Court in a context sufficiently concrete and particularized to make review appropriate.

The petition also seeks review of the rejection by the Philadelphia court of petitioner's claim that that court

was bound to accept the decision of the New Haven court on the merits of New Haven claims. This claim provides no independent ground for the present petition because it raises no question of "imperative public importance" that justifies review in advance of decision by the Court of Appeals.

We believe this contention by petitioner was without merit even when it was first made, because the New Haven court lacked jurisdiction over the *res*, because it had no *in personam* jurisdiction which would warrant according its decision *res judicata* effect, and because such an effect would be inconsistent with the policy of the Bankruptcy Act. Moreover, after the New Haven court's decision had been reversed for want of jurisdiction, it became clear that it could have no *res judicata* effect. See *Butler* v. *Eaton*, 141 U.S. 240; *Leader* v. *Apex Hosiery Co.*, 108 F.2d 71 (3d Cir. 1939), *aff'd*, 310 U.S. 469; 1B Moore, *Federal Practice*, ¶ 0.416[2] (1965). That the Court of Appeals has stayed its mandate pending decision by this Court on a petition for certiorari is irrelevant. See *Huron Holding Corp.* v. *Lincoln Mine Operating Co.*, 312 U.S. 183, 189; *Prager* v. *El Paso Nat'l Bank*, 417 F.2d 1111 (5th Cir. 1969); 1B Moore, *supra*, ¶ 0.416[3], pp. 2252-2253. In any event, this issue can appropriately be left to the Court of Appeals.

CONCLUSION

Wherefore, the petition for certiorari should be denied.

Respectfully submitted,

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September 1972